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(1)

No.

In the

Supreme Court of the United States

ACTION APARTMENT ASSOCIATION,
Petitioner,

v.

CITY OF SANTA MONICA, CITY COUNCIL OF THE CITY OF SANTA MONICA, COUNCIL MEMBERS ROBERT T. HOLBROOK (MAYOR), BOBBY SHRIVER (MAYOR PRO TEMPORE), PAM O'CONNOR, KEVIN McKEOWN, HERB KATZ, RICHARD BLOOM, and KEN GENSER, in their official capacities, and ALL PERSONS INTERESTED IN THE VALIDITY OF ORDINANCE NO. 2191 AMENDING MUNICIPAL CODE SECTIONS 9.56.050 AND 9.56.060,
Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The City of Santa Monica enacted Ordinance 2191, which mandates that certain developers of new residential units sell or rent a percentage of those units at below-market prices or rents to lower-income persons as a condition to obtaining a building permit.

Does a Fifth Amendment takings claim, based upon the "essential nexus" and "rough proportionality" tests articulated in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), lie against legislatively imposed exactions (like Ordinance 2191), as numerous state and federal courts have held? Or, are legislatively imposed exactions, including Ordinance 2191, immune to a takings claim under *Nollan* and *Dolan*, as the California Court of Appeal below and other courts have held?

CORPORATE DISCLOSURE STATEMENT

Action Apartment Association hereby states that it has no parent corporation, and that no publicly held corporation owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Action Apartment Association (Association) respectfully petitions this Court for a Writ of Certiorari to review the judgment of the California Court of Appeal.

OPINIONS BELOW

The opinion of the court of appeal is published at 166 Cal. App. 4th 456, 82 Cal. Rptr. 3d 722 (2008), and is included in Appendix (App.) A. The opinion of the California Superior Court is not published and is included in Appendix B. The opinion of the court of appeal denying the Association's Petition for Rehearing is not published and is included in Appendix C. The opinion of the California Supreme Court denying the Association's Petition for Review is not published and is included in Appendix D.

JURISDICTION

On August 28, 2008, the California Court of Appeal entered judgment affirming the dismissal of the Association's complaint. On December 10, 2008, the California Supreme Court denied the Association's Petition for Review. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

> [N]or shall private property be taken for public use without just compensation.

U.S. Const. amend. V.

The text of Santa Monica Municipal Code Chapter 9.56 and section 9.04.10.08.030 are reproduced in Appendix E and F, and the relevant portions of Santa Monica Municipal Code section 9.04.16.01.030 are reproduced in Appendix G.

INTRODUCTION

In this case, the California Court of Appeal held that where a regulatory taking is alleged, the constitutionally required principles of nexus and rough proportionality apply only to adjudicative exactions, *i.e.*, instances where, in an individualized, ad hoc setting, government offers a land use permit on condition that the permittee dedicate property or pay an in-lieu fee. In contrast, the decision permits a *legislature* to demand property or money from an entire class of landowners in exchange for land use permits, without having to demonstrate *any* nexus or proportionality between the alleged harmful effects of the proposed permitted activities and the property or money demanded by the legislature in return.

The court of appeal's application of the legislative-adjudicative distinction as a constitutional doctrine highlights a longstanding and continuing conflict among state and lower federal courts. Many courts have applied the heightened scrutiny of *Nollan v.*

California Coastal Commission, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to legislative exactions. *See, e.g.*, *Town of Flower Mound v. Stafford Estates Ltd.*, 135 S.W.3d 620, 641 (Tex. 2004) (applying *Nollan* and *Dolan* in challenge to town code requirement that developer improve abutting streets regardless of development's impact); *Home Builders Ass'n of Dayton & the Miami Valley v. City of Beaver Creek*, 729 N.E.2d 349, 354-56 (Ohio 2000) (applying *Nollan* and *Dolan* in challenge to impact fee ordinance); *Curtis v. Town of S. Thomaston*, 708 A.2d 657, 660 (Me. 1998) (applying *Nollan* and *Dolan* in challenge to town ordinance requiring construction of fire pond and dedication of public easement over pond as condition to approval of subdivision). Other courts, including the court of appeal below, have declined to apply heightened scrutiny to legislative exactions. *See* App. A at 20-21. *See also San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87, 104-06 (Cal. 2002) (declining to apply *Nollan* and *Dolan* in challenge to housing replacement fees imposed by hotel conversion ordinance); *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz.), *cert. denied*, 521 U.S. 1120 (1997) (declining to apply *Dolan* in challenge to legislatively imposed water resource development fee); *Waters Landing Ltd. P'ship v. Montgomery County*, 650 A.2d 712, 724 (Md. 1994) (declining to apply *Dolan* in challenge to legislatively adopted development impact "tax"); *Se. Cass Water Res. Dist. v. Burlington N. R.R. Co.*, 527 N.W.2d 884, 896 (N.D. 1995) (declining to apply *Nollan* and *Dolan* in challenge to legislative imposition of costs of making changes to railroad tracks to accommodate drainage improvements). This entrenched conflict among many jurisdictions is a strong reason for this Court's review.

Whether *Nollan* and *Dolan* apply to legislative exactions is an issue of exceptional importance, and bolsters the need for this Court's review. Land use exactions are commonplace throughout the nation. *See* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177, 203 (2006) ("Local government-imposed land development exactions have existed as long as localities have used zoning and subdivision regulation practices."). Both the regulated public and the regulators need to know the circumstances and conditions under which land use exactions may be imposed consistent with the Constitution's Takings Clause. Lower courts are thoroughly split on this issue. Clarification is desperately needed from this Court, not just to ensure the consistent application of the rule of law, but also—and especially—to protect the private property rights of those who seek development permits.

STATEMENT OF THE CASE

A. Ordinance 2191—Santa Monica's Affordable Housing Ordinance

On June 13, 2006, the City adopted Ordinance 2191, which amended Municipal Code sections 9.56.020, 9.56.040, 9.56.050, 9.56.060, and 9.56.070. *See generally* App. E. Ordinance 2191 modifies the options for meeting affordable housing requirements. The Ordinance is a species of inclusionary zoning regulation. "[S]uch programs either mandate or encourage developers of new residential projects to set aside a certain percentage of a project's residential units for lower and moderate-income households." Cecily T. Talbert & Nadia L. Costa, *Current Issues in Inclusionary Zoning*, 37 Urb. Law. 513, 514 (2005).

Ordinance 2191 follows this pattern. It mandates the onsite or offsite development of affordable housing units in conjunction with market-rate housing unit construction. App. E at 5-6 (Santa Monica Municipal Code § 9.56.040). Under the Ordinance, developers are required to transfer ownership of the required affordable unit or units to third persons for the benefit of the City's housing policies. *See generally id.* at 1 (Santa Monica Municipal Code § 9.56.010).

For on-site projects of between four and fifteen units, developers must dedicate 20% of the units for sale to moderate income households or for rent to low-income households. *Id.* at 6 (Santa Monica Municipal Code § 9.56.050(a)). For projects over fifteen units, the required dedication percentage is 25%. *Id.* at 6-7 (Santa Monica Municipal Code § 9.56.050(b)). Projects that will provide off-site affordable housing must dedicate 45% of the total units to affordable housing if the project is between four and fifteen units and 50% if the project is larger than fifteen units. *Id.* at 10 (Santa Monica Municipal Code § 9.56.060(a). Additionally, developers must also dedicate off-street, covered parking for the low-income units. *See* App. G (Santa Monica Municipal Code § 9.04.16.01.030(a)); *see also* App. F (Santa Monica Municipal Code § 9.04.10.08.030).

Subsequent to the filing of the Association's complaint and petition, the City amended Ordinance 2191 to include a waiver provision. A developer may avail itself of the waiver provision if, and only if, it establishes through "substantial evidence" that the required dedication would be unconstitutional as applied to it. App. E at 20-21 (Santa Monica Municipal Code § 9.56.170).

B. The Los Angeles Superior Court Grants the City's Demurrer and Dismisses the Case

On September 11, 2006, the Association filed a writ of mandate and complaint for declaratory and injunctive relief in the Superior Court for the County of Los Angeles. The complaint challenged the City's adoption of Ordinance 2191, advancing federal and state constitutional as well as state statutory causes of action.

On June 18, 2007, the superior court granted the City's demurrer and ordered the case dismissed. With respect to the Association's federal constitutional cause of action asserting that the heightened scrutiny of *Nollan* and *Dolan* should apply to Ordinance 2191, the superior court ruled that such scrutiny is inapplicable within the context of a facial challenge to generally applicable legislation. *See* App. B at 3-4. The court also concluded that dismissal was proper because the Ordinance's waiver provision—which allows a developer to obtain a waiver of the Ordinance if it can demonstrate that the waiver as applied is unconstitutional—allows the possibility of the Ordinance's constitutional application in at least some cases, thus foreclosing a facial challenge. *See id.* The court also dismissed the Association's remaining causes of action.[1]

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[1] The Association advanced four other causes of action under the federal and California constitutions, as well as under state statutory law. This Petition does not seek review of the lower courts' disposition of those other causes of action.

C. The California Court of Appeal Affirms the Dismissal

The court of appeal affirmed the trial court's dismissal. The court held that, because *Nollan* and *Dolan* apply exclusively to adjudicative decisions, Ordinance 2191—a legislative action—is not subject to the heightened scrutiny otherwise mandated by those cases. *See* App. A at 18-21. The court did not reach the issue of whether the Ordinance's waiver provision precludes a facial challenge.[2] *See id.* at 21. The court subsequently denied the Association's Petition for Rehearing. App. C. The California Supreme Court then denied the Association's Petition for Review. App. D.

REASONS FOR GRANTING THE WRIT

I

THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE CONFLICT AMONG STATE AND FEDERAL COURTS AS TO WHETHER THE HEIGHTENED SCRUTINY OF *NOLLAN* AND *DOLAN* APPLIES TO LEGISLATIVE EXACTIONS

Since this Court decided *Dolan* in 1994, state and federal courts have reached conflicting conclusions as to when to apply heightened scrutiny to land use exactions. The debate has developed in part around the legislative-adjudicative distinction. As set forth below, the stark conflict among lower courts as to the relevance of that distinction, for purposes of applying

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[2] The court also affirmed the dismissal of the Association's remaining causes of action. *See* App. A at 24.

Nollan and *Dolan*, strongly supports this Court's review of the California Court of Appeal's decision.

A. Many Courts, Including Several State Courts of Last Resort, Have Applied *Nollan* and *Dolan* to Legislative Exactions

Three state supreme courts have applied *Nollan* and *Dolan* to legislative exactions. *Town of Flower Mound v. Stafford Estates Ltd.*, 135 S.W.3d at 641 (applying *Nollan* and *Dolan* in a challenge to a town code requirement that a developer improve abutting streets regardless of the development's impact); *Home Builders Ass'n of Dayton & the Miami Valley v. City of Beaver Creek*, 729 N.E.2d at 354-56 (applying *Nollan* and *Dolan* in a challenge to impact fee ordinance); *Curtis v. Town of S. Thomaston*, 708 A.2d at 660 (applying *Nollan* and *Dolan* in a challenge to a town ordinance requiring construction of a fire pond and dedication of a public easement over the pond as a condition to approval of a subdivision). Many other courts have also applied *Nollan* and *Dolan* to legislative exactions. *See, e.g., Amoco Oil Co. v. Village of Schaumberg*, 661 N.E.2d 380, 389-91 (Ill. App. Ct. 1995), *review denied*, 667 N.E.2d 1055 (Ill.), *cert. denied*, 519 U.S. 976 (1996) (applying *Nollan* and *Dolan* to a "purely legislative" requirement that twenty percent of a special use permit applicant's property be dedicated to the public); *Nat'l Ass'n of Home Builders of United States v. Chesterfield County*, 907 F. Supp. 166, 168-69 (E.D. Va. 1995) (applying *Nollan* and *Dolan* in a challenge to a legislatively adopted cash proffer policy for residential rezoning applications), *aff'd*, 92 F.3d 1180 (4th Cir. 1996) (per curiam), *cert. denied*, 519 U.S. 1056 (1997). *Cf. Art Piculell Group v.*

Clackamas County, 922 P.2d 1227, 1235 n.6 (Or. Ct. App. 1996) (observing that "the fact that a specific condition that, by its nature, is subject to the rough proportionality test is mandated by general local legislation does not alter the *Dolan* analysis in any way"). Of these cases, the Texas Supreme Court's decision in *Town of Flower Mound* best illustrates the argument that *Nollan* and *Dolan* apply to legislative exactions.

In *Town of Flower Mound*, the Texas Supreme Court considered a developer's challenge to a requirement of the town's development code. The code mandated that, as a condition to obtaining permitting approval for a new residential subdivision, the developer must improve abutting streets, regardless of the development's impact on those streets. *See* 135 S.W.3d at 622-23. The town argued that *Nollan* and *Dolan* apply only to "exaction[s] . . . imposed on an ad hoc, individualized basis." *Id.* at 640. The court rejected the town's attempt to limit *Nollan* and *Dolan* to " 'adjudicative' decisions." *See id.* The court observed that the risk of extortionate behavior can be just as great with legislatively imposed exactions as with exactions determined in an adjudicative and individualized setting, and expressed doubt as to whether the distinction between legislative and adjudicative exactions is workable. *Id.* at 641. Concluding that heightened scrutiny should be applied to the legislative exaction at issue, *see id.* at 642, the court went on to hold that the exaction constituted a compensable taking, *id.* at 645.

B. On the Contrary, Many Courts, including the Supreme Courts of California, Arizona, Maryland, and North Dakota, as Well as the Ninth Circuit Court of Appeals, Have Held That *Nollan* and *Dolan* Apply Only to Adjudicative Exactions

Four state supreme courts have held that heightened scrutiny should not apply to legislative exactions. *See San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d at 104-06 (declining to apply *Nollan* and *Dolan* in a challenge to housing replacement fees imposed by a hotel conversion ordinance); *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d at 1000 (declining to apply *Dolan* in a challenge to a legislatively imposed water resource development fee); *Waters Landing Ltd. P'ship v. Montgomery County*, 650 A.2d at 724 (declining to apply *Dolan* in a challenge to a legislatively adopted development impact "tax"); *Se. Cass Water Res. Dist. v. Burlington N. R.R. Co.*, 527 N.W.2d at 896 (declining to apply *Nollan* and *Dolan* in a challenge to legislative imposition of costs of making changes to railroad tracks to accommodate drainage improvements). Recently, the Ninth Circuit Court of Appeals joined them. *See McClung v. City of Sumner*, 548 F.3d 1219, 1227 (9th Cir. 2008), *pet'n for cert. pending* (declining to apply *Nollan* and *Dolan* in a challenge to ordinance requiring replacement of storm water pipe in exchange for building permit). Of these cases, the California Supreme Court's decision in *San Remo* offers the most developed argument that *Nollan* and *Dolan* should not apply to legislative exactions.

In *San Remo*, a hotel owner wished to convert certain rooms within the hotel, which San Francisco had designated as "residential," to rooms available for transient, tourist use. *See* 41 P.3d at 95. Under the city's hotel conversion ordinance, the hotel owner was required to mitigate for the loss of residential housing. The hotel owner subsequently challenged the legislatively imposed mitigation—a $567,000 in-lieu fee—as a violation of the constitutional mandates of nexus and rough proportionality. The California Supreme Court, in rejecting the hotel owner's takings claim, held that *Nollan* and *Dolan* did not apply to fees imposed under the city's hotel conversion ordinance. The court reasoned that the fee was nondiscretionary, *id.* at 104, that it was imposed by "generally applicable legislation," *id.*, and that the exaction could not fairly be characterized as "an individualized development fee[]," *id.* at 105 (internal quotation marks omitted). One of the central reasons supporting the court's analysis was its conclusion that constitutional abuses in local land use permitting can be prevented without the need for close judicial scrutiny. Specifically, the court asserted that legislatively imposed exactions that might otherwise be constitutionally problematic can be controlled by "the ordinary restraints of the democratic political process." *Id.* The court went on to uphold the exaction's constitutionality. *See id.* at 111.

C. The Conflict Among Lower Courts as to When *Nollan* and *Dolan* Should Apply Is Critically Important and Deserves Resolution by This Court

The conflict in Fifth Amendment doctrine demonstrated by these cases has real-life consequences for millions of American property owners, particularly

those in the West, where neither the California state courts nor the Ninth Circuit Court of Appeals recognizes the constitutional requirement of a nexus and rough proportionality for exactions legislatively imposed as a condition for a building permit. Development exactions are commonplace. *See* Rosenberg, *supra*, at 203. *See also* David L. Callies, *Paying for Growth & Planning Gain: An Anglo-American Comparison of Development Conditions, Impact Fees and Development Agreements*, 23 Urb. Law. 221, 231-32 (1991). With judicial approval, as in this case, enterprising localities unfairly enact laws to obtain land or money from developers to benefit society as a whole—an approach long ago disapproved in *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). *See, e.g.*, J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go From Here*, 59 Wash. & Lee L. Rev. 373, 404-05 (2002) ("Today's democratic legislative process is entirely conducive to forcing a landowning minority to shoulder an unfair portion of a general public burdens, in accordance with the will of a non-landowning majority."). As this Court recognized in *Nollan*, without constitutional checks, exactions can easily become "out-and-out plan[s] of extortion." 483 U.S. at 837.

The harm to the constitutional rights of permit applicants will be significant if this Court refuses to

review the legislative-adjudicative distinction and its relevance to *Nollan* and *Dolan*. Over four hundred local governments across the nation have some form of inclusionary zoning program, whereby development permits are conditioned on the dedication of affordable housing units.[3] Under inclusionary zoning regimes, local governments force developers to swallow the costs of providing below-market housing. *See* Tom Means, *et al.*, *Below-Market Housing Mandates as Takings: Measuring Their Impact*, Ind. Pol'y Rep. at 7 (Nov. 2007). In these pressing economic times, the fact that inclusionary zoning programs and other forms of exactions can have the effect of increasing housing costs makes review of the legislative-adjudicative distinction all the more important. *See, e.g.*, Benjamin Powell & Edward Stringham, *Housing Supply and Affordability: Do Affordable Housing Mandates Work?*, Reason Public Policy Institute Policy Study 318, at v (Apr. 2004), *available at* http://www.reason.org/ps318.pdf (last visited Mar. 4, 2009) ("Inclusionary zoning has failed to produce a significant number of affordable homes . . . . By restricting the supply of new homes and driving up the price of both newly constructed market-rate homes and the existing stock of homes, inclusionary zoning makes housing less affordable."); Center for Housing Policy, *The Effects of Inclusionary Zoning on Local Housing Markets: Lessons from the*

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[3] Timothy S. Hollister, *et al.*, *National Survey of Statutory Authority and Practical Considerations for the Implementation of Inclusionary Zoning Ordinances* 49 (Jun. 2007), *available at* http://www.shipmangoodwin.com/files/Publication/6b1bce66-ef21-43eb-8e40-0134792cd8f2/Presentation/PublicationAttachment/176980f4-0626-44e2-b3fa-09029bd18878/national_survey_statutory_authority.pdf (last visited Mar. 4, 2009).

San Francisco, Washington, D.C., and Suburban Boston Areas 11 (Mar. 2008), *available at* http://www.nhc.org/pdf/pub_chp_iz_brief08.pdf (last visited Mar. 4, 2009) ("[R]esearch suggests that these [local development] regulatory barriers are driving up housing prices by constraining the ability of the market to respond effectively to demand.").

Lower courts' reliance upon "the ordinary restraints of the democratic political process" do not adequately protect individuals' constitutional rights, given that "legislative land use decisions made at the local level may reflect classic majoritarian oppression." Inna Reznick, Note, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 271 (2000). Extortion through the permitting process is "just as likely to occur in legislative decisionmaking processes as in adjudicative settings." *Id.* at 247. The legislative-adjudicative distinction often produces perverse incentives for land use authorities, in that "[t]he more property and owners affected, the *less* likely courts will apply meaningful scrutiny to that decision." Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 Urb. Law. 487, 515 (2006). Indeed, Justice Thomas has observed that the "distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference." *Parking Ass'n of Ga. v. City of Atlanta*, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting from denial of certiorari).

Moreover, the legislative-adjudicative distinction is irreconcilable with this Court's categorization, in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), of

Nollan and *Dolan* as specific applications of the unconstitutional conditions doctrine.[4] *Id.* at 547 ("[T]hese cases involve a special application of the doctrine of unconstitutional conditions . . . .") (internal quotation marks omitted). Under the unconstitutional conditions doctrine, it does not matter who (the Legislature or an administrative agency) demands the condition; rather, what matters is whether the condition amounts to the sacrifice of a constitutionally protected right in order to receive something of value from the government. *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989) (discussing commentators' explanations of the doctrine, none of which turns upon the type of governmental body imposing the condition). *See also* Breemer, *supra*, at 402 ("[T]o the extent that *Nollan* and *Dolan* flow from the unconstitutional conditions doctrine, courts should not limit the essential nexus test to administrative exactions because no distinction between legislative and administrative conditions exists in unconstitutional

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[4] The scholarly commentary supports the characterization. *See, e.g.*, David L. Callies & Christopher T. Goodin, *The Status of* Nollan v. California Coastal Commission *and* Dolan v. City of Tigard *After* Lingle v. Chevron U.S.A., Inc., 40 J. Marshall L. Rev. 539, 559-62 (2007) (arguing that *Nollan* and *Dolan* are special applications of the unconstitutional conditions doctrine); Lauren Reznick, Note, *The Death of* Nollan *and* Dolan*? Challenging the Constitutionality of Monetary Exactions in the Wake of* Lingle v. Chevron, 87 B.U. L. Rev. 725, 756-57 (2007) (setting forth an unconstitutional conditions argument against monetary exactions); Jane C. Needleman, Note, *Exactions: Exploring Exactly When* Nollan *and* Dolan *Should Be Triggered*, 28 Cardozo L. Rev. 1563, 1576 (2006) (arguing that application of *Nollan* and *Dolan* should be triggered when a municipality attempts to achieve indirectly what it would be forbidden to achieve directly).

conditions cases involving other constitutional provisions.").

The lower courts are in sharp disagreement over when to apply the heightened scrutiny of *Nollan* and *Dolan*. Resolution of that disagreement will serve the interests of property owners and governments alike by providing certainty and clarity. Failure to resolve the conflict among the lower courts will not just lead to more confusion, it will also, de facto, sanction local governments' extortionate practices in administering land use permitting programs.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

DATED: March, 2009.

Respectfully submitted,

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ACTION APARTMENT ASSOCIATION, Plaintiff and Appellant, v. CITY OF SANTA MONICA et al., Defendants and Respondents.	B201176 (Los Angeles County Super. Ct. No. SC091036

FILED Aug. 28, 2008

APPEAL from a judgment of the Superior Court of Los Angeles County, James A. Bascue, John A. Kronstadt, and John L. Segal, Judges. Affirmed.

Rosario Perry, James S. Burling, Graham Owen, and Damien M. Schiff for Plaintiff and Appellant.

Marsha Jones Moutrie, City Attorney (Santa Monica), Joseph Lawrence, Assistant City Attorney, and Alan Seltzer, Chief Deputy City Attorney for Defendants and Respondents.

I. INTRODUCTION

This is a principally a takings case. In *Dolan v. City of Tigard* (1994) 512 U.S. 374, 386-391 and *Nollan*

v. California Coastal Commission (1987) 483 U.S. 825, 836-837, the United States Supreme Court adopted what is called a "nexus" and "rough proportionality" test to be applied in an "exaction" case; i.e. when a public entity conditions approval of a proposed development on the dedication of property to public use. (See *Monterey v. Del Monte Dunes at Monterey, Ltd.* (1999) 526 U.S. 687, 702.) The United States and California Supreme Courts have only applied the *Nollan/Dolan* nexus and rough proportionality test when an adjudicative decision is made in the case of an individual developer's request for approval of a project. (*San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 670; see *Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 546.)

Plaintiff, Action Apartment Association, challenges the June 13, 2006 enactment of Ordinance No. 2191 which modified existing requirements on multi-family housing construction. Plaintif .rgues Ordinance No. 2191, on its face, constitutes an unlawful uncompensated taking. Plaintiff asserts the decision of the United States Supreme Court in *Lingle v. Chevron U.S.A. Inc.*, *supra*, 544 U.S. at page 547 expands the *Nollan/Dolan* nexus and rough proportionality test beyond the scope of an individual adjudicative decision. Plaintiff argues that the *Nollan/Dolan* nexus and rough proportionality test applies in the case of a *facial* challenge to a land use regulation; not only when conducting judicial review of an adjudicative decision made in the case of an individual developer's request for approval of a project. Thus, plaintiff argues it is entitled to a trial on its takings claim utilizing the *Nollan/Dolan* nexus and rough proportionality test. Also, plaintiff argues

Ordinance No. 2191 could not be operative without prior review by the California Department of Housing and Community Development pursuant to Government Code section 65585, subdivision (b). We disagree with both of plaintiff's challenges to Ordinance No. 2191 and affirm the judgment.

II. THE VERIFIED COMPLAINT

On September 11, 2006, plaintiff filed its verified complaint which sought to invalidate Ordinance No. 2191. Named as defendants are the City of Santa Monica (the city) and its city council (the council). On June 13, 2006, the council adopted Ordinance No. 2191 which amended Santa Monica Municipal Code[1] sections 9.56.020, 9.56.030, 9.56.040, 9.56.050, 9.56.060, and 9.56.070. According to plaintiff, an association of owners of developed and undeveloped properties, the ordinance modified the options for meeting affordable housing requirements. The ordinance imposed requirements on developers constructing multi-family ownership housing projects in a multi-family residential district. Under those circumstances, absent a waiver, the developer was required to construct affordable housing on the site of the development or at another location.

In the first cause of action for an unlawful taking under the federal and state Constitutions, plaintiff alleged: the requirements to build subsidized affordable housing units were not roughly proportional to any impact that might occur from the construction of new or replacement condominium units; there was no nexus between the construction of new or

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[1] All future references to a municipal code are to the Santa Monica Municipal Code.

replacement condominium units and the need for subsidized housing; defendant had failed to demonstrate any nexus or rough proportionality between the construction of new or replacement market-rate housing and a significant need for more subsidized housing; and market forces were not responsible for an absence of affordable housing within defendant's boundaries. Thus according to plaintiff, on its face, Ordinance No. 2191 violated the takings clauses of the Fifth Amendment of the United States Constitution and article I, section 19 of the California Constitution because: there was an absence of a nexus between the construction of market rate residences and a shortage of "affordable units"; defendants had conducted no study which verified the existence of any rough proportionality between the construction of new or replacement market-rate homes and a significant increased need for subsidized housing; builders and buyers alike were not responsible for the purported lack of affordable housing in the city; and to the extent the buyers nor builders of housing have the responsibility to house the city's workforce, that obligation should not be disproportionately incurred by the purchasers of new market-rate housing.

The first cause of action alleged: "The lack of a nexus between the construction of market-rate housing within the City of Santa Monica and a shortage of 'affordable units' within the City of Santa Monica means that the affordable unit and related conditions found in City of Santa Monica's Ordinance [No.] 2191 violate the Takings Clause of the Fifth Amendment to the United States Constitution and the Takings Clause of Article I, section 19, of the California Constitution." In addition, plaintiff alleged the ordinance failed to advance any substantial governmental interest and

thus further violated the state constitution takings clause. Hence, plaintiff sought a declaration that the ordinance violated the federal and state constitutional takings clauses.

The second cause of action alleged defendants had failed to determine whether there was a reasonable relationship between the use of the "fee" and the type of development upon which the "fee" would be imposed. Additionally, defendants failed to determine there was a reasonable relationship between the need for the "public facility" and the type of project upon which the "fee" was imposed. Therefore, plaintiff alleged Ordinance No. 2191 violated Government Code sections 66000 through 66022.

The third cause of action sought a declaration that Ordinance No. 2191 violated Government Code sections 65583 and 65585. According to plaintiff, by reason of Ordinance No. 2191 alone and in combination with the city's zoning codes and related height, setback, and parking requirements, it was now "physically and economically infeasible" for property owners to build new or replacement condominium housing. Also, because of the city's zoning code, there were limits on the number of condominium units that could be placed on a single lot. Because of the density limits and the onsite affordable housing construction requirements created by Ordinance No. 2191, a builder could no longer physically take advantage of the maximum density bonus provided by state law. Thus, because Ordinance No. 2191, standing alone or in conjunction with the city's zoning code, created a constraint on the production of new housing; as such it must be approved by the California Department of Housing and Community Development. Ordinance No.

2191 was never submitted to the state Department of Housing and Community Development for review or approval, thereby violating Government Code sections 65583 and 65585.

The fourth cause of action alleged Ordinance No. 2191 affected property rights and failed to advance a legitimate governmental interest. Further, Ordinance No. 2191 discouraged the construction of new or replacement housing thereby exacerbating the shortage of affordable housing in the city. Because Ordinance No. 2191 failed to advance any governmental interest, it was violative of the federal and state constitutional due process clauses according to plaintiff. The fifth cause of action realleged the factual allegations in the preceding causes of action. According to the complaint, without the issuance of a writ of mandate, plaintiff's members' aforementioned constitutional and statutory rights would be violated. Plaintiff thus sought a writ of mandate enjoining defendants from enforcing Ordinance No. 2191.

The prayer for relief sought a declaration that Ordinance No. 2191 violated: the takings clauses of the federal and state Constitutions; the state and federal constitutional due process clauses; and Government Code sections 66000 through 66022, 65583, and 65585. Also, the prayer for relief sought a determination pursuant to Government Code section 66022, subdivision (b) and Code of Civil Procedure sections 860 through 863 that the affordable housing requirements in Ordinance No. 2191 were invalid. Moreover, the prayer for relief sought the issuance of a peremptory writ of mandate and an attorney's fees award.

III. DEFENDANTS' DEMURRER AND JUDICIAL NOTICE REQUEST

On April 17, 2007, defendants demurred to the complaint. As to the first cause of action, defendants asserted that: no regulatory takings cause of action was stated because the "substantially advance" test does not apply to such a claim; heightened scrutiny under the nexus and rough proportionality tests cannot apply to a facial challenge to a regulatory enactment of general application such as Ordinance No. 2191; and there was no allegation plaintiff's members had exhausted their administrative remedies or it would be futile to do so. As to the second cause of action, defendants argued: no claim could be stated for a violation of the Fee Mitigation Act (Gov. Code, § 66000 et seq.) as no fee was imposed; even if the obligation to build affordable housing was a fee, no validation action can be pursued pursuant to Government Code section 66002; and any challenge to a fee was barred by the failure to comply with Government Code section 66022. Defendants argued that demurrer should be sustained to the third cause of action for declaratory relief because: Government Code section 65887, subdivision (b) "requires any action to review housing element conformity" to be brought in a Code of Civil Procedure section 1085 mandate petition; no analysis was required by the Department of Housing and Community Development because Ordinance No. 2191 was not part of an "adoption or update" of the city's housing element; the State Department of Housing and Community Development did not have the authority to approve a municipal ordinance; and plaintiff's cause of action is moot because the city had met its "Regional Housing Needs Assessment . . . fair share target" set forth in the housing element.

As to the fourth cause of action, defendants argued that no facial due process violation was pled because the "substantially advance" test is inapplicable to Ordinance No. 2191 and there were insufficient facts pled showing it was egregiously arbitrary and irrational. Further, defendants asserted, "[T]here is a reasonable relationship between the obligation to construct affordable housing units as imposed by Ordinance [No.] 2191 and the need for such housing caused by the subject development." Moreover, defendants argued plaintiff's members had failed to exhaust their administrative remedies or that it would be futile to do so. Finally, as to the fifth cause of action, defendants argued: the mandate claim was premised on the unlawful takings, Fee Mitigation Act, and due process causes of action which had no merit; they had no ministerial duty to perform any act; and they had not failed to exercise discretion under a proper interpretation of the law.

Defendants filed a lengthy judicial notice request concurrently with their demurrer. Defendants sought judicial notice of 20 separate documents. Those documents indicate the following. Pursuant to a 1990 initiative, Santa Monica City Charter section 630[2] required that at least 30 per cent per year of all newly constructed "multifamily-residential housing" be permanently affordable by low and moderate income residents.[3]

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[2] All future references to a charter are to the Santa Monica City Charter.

[3] Section 630 of the city charter states: "The City Council by ordinance shall at all times require that not less than thirty percent (30%) of all multifamily-residential housing newly

(continued...)

According to a December 30, 2003 report to the mayor and the council, charter section 630 resulted from the adoption of Proposition R in the November 6, 1990 election. In March 1992, the council adopted Ordinance No. 1615 which required that in most instances a developer of multifamily housing build affordable units on site. On July 21, 1998, the council replaced Ordinance No. 1615 with Ordinance No. 1918, the Affordable Housing Production Program, which was codified in municipal code chapter 9.56.

The December 30, 2003 report to the mayor and the council indicated that in fiscal year 2002 and 2003, only 0.5 percent of multifamily units constructed in that year complied with charter section 630. That low percentage of affordable housing units did not comply with charter section 630. Further, in fiscal years 2002 and 2004, it was anticipated that only 21 percent of newly constructed total units would be affordable to low and moderate income households. As noted, charter section 630 required that least 30 per cent per

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[3] (...continued)
constructed in the City on an annual basis is permanently affordable to and occupied by low and moderate income households. For purposes of this Section, 'low income household' means a household with an income not exceeding sixty percent (60%) of the Los Angeles County median income, adjusted by family size, as published from time to time by the United States Department of Housing and Urban Development, and 'moderate income household' means a household with an income not exceeding one hundred percent (100%) of the Los Angeles County median income, adjusted by family size, as published from time to time by the United States Department of Housing and Urban Development. At least fifty percent (50%) of the newly constructed units required to be permanently affordable by this Section shall be affordable to and occupied by low income households."

year of all newly constructed "multifamily-residential housing" be permanently affordable to low and moderate families. Municipal code section 9.56.150 required the council to take action to insure compliance with the minimum construction requirements in charter section 630.

On April 11, 2006, the council adopted Ordinance No. 2180. Ordinance No. 2180 was adopted in response to state legislation which: gradually increased the "the density bonus" to 35 percent and expanded its availability to senior mobile home parks, community apartment developments, and stock cooperatives; mandated reductions of set aside requirements for construction of affordable units; permitted a developer to request a waiver of development standards if necessary to make a project feasible; mandated that a municipality grant concessions to a developer unless certain findings were made; and required that cities adopt ordinances implementing the new changes in statewide law. In accord with state law, Ordinance No. 2180 modified the city's existing density bonus regulations and low and moderate housing construction requirements and otherwise complied with recent statewide housing enactments. Other documents were attached which identified actions by other counties and cities to modify their housing policies. Finally, the judicially noticeable materials indicated that Housing and Community Development Department certified that the city's housing element was in full compliance with California housing element law.

Defendants also sought judicial notice of the relevant provisions of the municipal code. Municipal code chapter 9.56 set forth the requirements for the

city's affordable housing production program. In order to secure a development permit, a multi-family project developer has the following options: provide on site affordable housing units in accord with municipal code section 9.56.050; provide off-site affordable housing units pursuant to section 9.56.060; pay an affordable housing fee in accordance with municipal code section 9.56.070; or acquire land for affordable housing pursuant to municipal code section 9.56.080. (Mun. Code, § 9.56.040.)

Municipal code chapter 9.56 contains a waiver or adjustment provision. Municipal code section 9.56.170 permits an applicant for permission to build a multifamily project to request an adjustment or waiver if the requirements of chapter 9.56 effectuated an unconstitutional taking or would otherwise have "an unconstitutional application" to the property. In order to secure an adjustment or waiver, a request must be filed with the Director of Resource Management at the same time as the applicant files the multi-family project application. The applicant has the burden of presenting substantial evidence to support the request and must set forth in detail the factual and legal basis of the claim. According to municipal code section 9.56.170, in ruling on an adjustment or waiver application, the resource management director or the city council on appeal assumes: the applicant is subject to the affordable housing requirement in chapter 9.56; the applicant would benefit from the "inclusionary incentives" in chapter 9.56 and elsewhere in the municipal code; and the applicant is obligated to provide the "most economical" affordable housing units in terms of construction, design, location, and tenure.

Finally, defendants lodged the administrative record pertinent to the adoption of ordinance No. 2191. On May 10, 2005, the city council considered issue relating to affordable housing. In a report bearing the same date, city staff related: the city was "committed" to producing affordable law; rather than construct affordable units, most developers elect to pay the "affordable housing fee"; and there is thus a relationship between the amount of fees collected which are then used to produce affordable low or moderate income housing stock. The report further stated: if the affordable housing fee were increased, there would be additional funds available to leverage greater low and moderate income housing construction; one way to increase low and moderate income housing construction would be to defer, reduce, or waive the collection of other construction permit fees or assessments; and other options designed to increase low and moderate income housing construction included streamlining the development permitting process or even amending Proposition R. Finally, the May 10, 2005 report contained an analysis of the various legal options available to the city. The report contained attachments detailing technical questions raised when evaluating affordable housing issues. The report recommended the council discuss "various affordable housing strategies" consistent with decisions of the United States and California Supreme Courts and Courts of Appeal.

A July 12, 2005 report prepared for a council meeting on that date stated that city staff had previously been directed on November 25, 2003 to evaluate affordable housing production in order to meet the "goals" imposed by Proposition R. The report recommended increasing developer fees and permitting

an applicant to secure a waiver of or reduction of requirements imposed by the city's affordable housing program. Attached to the July 12, 2005 report was a 103-page July 1, 2005 report detailing the nexus between new market rate multi-family developments in the city and the need for affordable housing.

On October 11, 2005, Ordinance No. 2174 was presented to the city council for first reading consideration. The proposed ordinance amended municipal code sections 9.56.010, 9.56.020, and 9.56.070 in chapter 9.59 by: modifying the calculation, adjustment, and payment timing of the affordable housing fee; adjusting the affordable housing definitions; and establishing a waiver and adjustment process. Ordinance No. 2174 was adopted on November 8, 2005.

IV. PLAINTIFF'S OPPOSITION

Plaintiff argued that Ordinance No. 2191 constituted a taking subject to the nexus and rough proportionality tests discussed in: *Lingle v. Chevron U.S.A. Inc.*, *supra*, 544 U.S. at page 547; *Dolan v. City of Tigard*, *supra*, 512 U.S. at pages 386-391; and *Nollan v. California Coastal Commission*, *supra*, 483 U.S. at pages 836-837. Additionally, plaintiff challenged the imposition of the burden of persuasion on the developer in municipal code section 9.56.170; the provision permitting an applicant to secure a waiver or adjustment of the minimum low and medium cost housing construction requirements. Plaintiff argued that it should be given the opportunity at a trial to demonstrate defendants could not justify the alleged uncompensated takings resulting from the adoption of Ordinance No. 2191.

As to the third cause of action for alleging a violation of Government Code section 65883 and 65585, plaintiff contended that it had set forth the requirements for a traditional mandamus claim. Plaintiff argued that Ordinance No. 2191 was in essence a de facto amendment to the city's housing element which must be submitted to the state Department of Housing and Community Development. Since these allegations were alleged in the third cause of action, plaintiff argued that demurrer should be overruled. Finally, plaintiff contended mandate claims were stated by reason of the allegations concerning the alleged uncompensated takings and the state housing element law.

V. DEFENDANTS' REPLY

As to the takings arguments, defendants contended: there is no heightened scrutiny of generally applicable economic legislation; Ordinance No. 2191 is generally applicable economic legislation; and the waiver provision in municipal code section 9.56.170 prevents plaintiff from making a facial challenge to Ordinance No. 2191.

VI. DISCUSSION

A. Overview

Plaintiff argues that Ordinance No. 2191 is a facially invalid exaction subject to the *Nollan/Dolan* heightened scrutiny nexus and rough proportionality test. According to plaintiff, sufficient facts were alleged to require a trial on the nexus and proportionality issues. Defendants argue that because plaintiff's challenge is a facial attack and not raised on the context of an adjudication of an individual development request, judicial review of Ordinance No.

2191 utilizing the *Nollan/Dolan* nexus and rough proportionality test is not in order. Further, defendant argues that plaintiff's assertion Ordinance No. 2191 was a de facto amendment to the city's housing element requiring review by the Department of Community Housing and Development is without merit.

B. Plaintiff's Facial Constitutional Claims Are Without Merit

1. The nature of a facial challenge

Our Supreme Court has defined a facial challenge is a statute thusly: "In discussing the standard for evaluating a facial constitutional challenge to a statute, we stated in *Tobe v. City of Santa Ana* (1995) 9 Cal. 4th 1069: 'A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual. [Citation.] '"To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute . . . . Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions."' [Citations.]' (*Id.* at p. 1084, original italics and ellipsis.)" (*California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 338.) In the context of a facial takings claim, a party attacking a statute must demonstrate that its mere enactment constitutes a taking and deprives the owner all viable use of the property at issue. (*Tahoe-Sierra Preservation Council, Inc. v. Tahoe*

Regional Planning Agency (2002) 535 U.S. 302, 318; *Suitum v. Tahoe Regional Planning Agency* (1997) 520 U.S. 725, 736, fn. 10.) The United States Supreme Court has defined a facial takings claim as an "uphill battle" and "difficult" to demonstrate. (*Ibid.*; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.* (1981) 452 U.S. 264, 297.)

2. Takings jurisprudence

There are two types of compensable takings—categorical and regulatory. (*Brown v. Legal Foundation of Wash.* (2003) 538 U.S. 216, 233; *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 617.) When an owner's property is taken, in whole or in part, by government for a public purpose, there is a categorical duty of compensation. (*Brown v. Legal Foundation of Wash., supra*, 538 U.S. at p. 233; *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, supra*, 535 U.S. at p. 321-323.) Further, there are two types of compensable regulatory takings. The first type of compensable regulatory taking occurs when a property owner is deprived of "all economically beneficial or productive use" of the property. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015; *Santa Monica Beach Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 964.) Generally speaking, the second type of compensable regulatory taking occurs when a complex set of factors are considered including: the character of the government action in terms whether it is a physical invasion or an accommodation of the benefits and burdens of economic life to promote the common good; in large part, the regulation's economic effect on the landowner; and the extent to which the regulation interferes with distinct investment-backed

expectations. (*Lingle v. Chevron U.S.A. Inc.*, *supra*, 544 U.S. at pp. 546-547; *Palazzolo v. Rhode Island*, *supra*, 533 U.S. at pp. 617-618; *San Remo Hotel v. City and County of San Francisco*, *supra*, 27 Cal. 4th at p. 664.) In the context of this second form of regulatory taking, the appraisal of these complicated factors is to prevent, in the framework of this case, plaintiff's members from unfairly bearing public burdens which the body politic as a whole should be compelled to accept. (*Armstrong v. United States* (1960) 364 U.S. 40, 49; *San Remo Hotel v. City and County of San Francisco*, *supra*, 27 Cal. 4th at p. 664.)

Aside from these general takings principles, there is a special rule initially developed in *Nollan v. California Coastal Commission*, *supra*, 483 U.S. at pages 835-838 which is applicable to land use exactions—demands by governments that landowners dedicate portions of their property as a condition of securing development permits. The United States Supreme Court identified a two part test to be applied in so-called exaction cases. First, there must exist an "essential nexus" between the "'legitimate state interest'" the government asserts will be furthered by the condition of a development permit and the exaction itself. (*Dolan v. City of Tigard*, *supra*, 512 U.S. at p. 386; *Nollan v. California Coastal Commission*, *supra*, 483 U.S. at p. 837.) Second, there must exist a "rough proportionality" between a development restriction imposed on a landowner and the extent of the impact the state imposed development condition is supposed to mitigate. This part of the test in an exaction case was articulated in *Dolan v. City of Tigard*, *supra*, 512 U.S. at page 391 thusly: "We think a term such as 'rough proportionality' best

encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (See *Lingle v. Chevron U.S.A. Inc.*, *supra*, 544 U.S. at p. 547; *San Remo Hotel v. City and County of San Francisco*, *supra*, 27 Cal.4th at p. 666.)

3. The two pronged *Nollan/Dolan* test does not apply to plaintiff's facial challenge to Ordinance No. 2191

Plaintiff argues that it is entitled to assert a facial challenge to Ordinance No. 2191 utilizing the two-pronged *Nollan/Dolan* test. Both the United States and California Supreme Courts have explained the two part *Nollan/Dolan* test developed for use in land exaction takings litigation applies only in the case of individual adjudicative permit approval decisions; not to generally applicable legislative general zoning decisions. (*Monterey v. Del Monte Dunes at Monterey, Ltd.*, *supra*, 526 U.S. at p. 702; *Santa Monica Beach, Ltd. v. Superior Court*, *supra*, 19 Cal.4th at p. 967; see *Lingle v. Chevron U.S.A. Inc.*, *supra*, 544 U.S. at p. 547.) In *San Remo Hotel v. City and County of San Francisco*, *supra*, 27 Cal.4th at page 670, our Supreme Court explained: "The 'sine qua non' for application of *Nollan/Dolan* scrutiny is thus the 'discretionary deployment of the police power' in 'the imposition of land-use conditions in individual cases.' (*Ehrlich [v. City of Culver City* (1996) 12 Cal.4th 854,] 869 (plur. opn. of Arabian, J.).) Only 'individualized development fees warrant a type of review akin to the conditional conveyances at issue in *Nollan* and *Dolan*.'

(*Santa Monica Beach, supra*, 19 Cal.4th at pp. 966-967; see also *Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal.4th 1006, 1022 [ ] [heightened scrutiny applies to 'development fees imposed on a property owner on an individual and discretionary basis'].)" Thus, prior to *Lingle*, we could not apply the two pronged *Nollan/Dolan* test to plaintiff's facial challenge of Ordinance No. 2191.

Plaintiff argues that the United States Supreme Court in *Lingle v. Chevron U.S.A. Inc.*, *supra*, 544 U.S. at page 547, has changed the foregoing jurisprudence and permits use of the *Nollan/Dolan* nexus and rough proportionality test when conducting a facial attack on land use regulations. This contention has no merit. The issue before the Supreme Court in *Lingle* was whether the substantially advance legitimate state interests takings test in *Agins v. City of Tiburon* (1980) 447 U.S. 255, 260 remained viable. Plaintiff relies on the following language in *Lingle* for the proposition that the *Nollan/Dolan* nexus and proportionality test now applies to facial claims: "Although *Nollan* and *Dolan* quoted *Agins'* language, see *Dolan*, *supra*, at 385; *Nollan*, *supra*, at 834, the rule those decisions established is entirely distinct from the 'substantially advances' test we address today. Whereas the 'substantially advances' inquiry before us now is unconcerned with the degree or type of burden a regulation places upon property, *Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings. In neither case did the Court question whether the exaction would substantially advance *some* legitimate state interest. See *Dolan*, *supra*, at 387-388; *Nollan*, *supra*, at 841. Rather, the

issue was whether the exactions substantially advanced the *same* interests that land-use authorities asserted would allow them to deny the permit altogether. As the Court explained in *Dolan*, these cases involve a special application of the 'doctrine of "unconstitutional conditions,"' which provides that 'the government may not require a person to give up a constitutional right-here the right to receive just compensation when property is taken for a public use-in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.' [Citation.]" (*Lingle v. Chevron U.S.A. Inc.*, *supra*, 544 U.S. at p. 547.)

In *Lingle*, the Supreme Court held the *Agins* analysis was no longer a "standalone" or "free standing" test for a regulatory taking. (*Lingle v. Chevron U.S.A. Inc.*, *supra*, 544 U.S. at pp. 540, 545.) The Supreme Court did not purport to hold the two pronged *Nollan/Dolan* test applied to a facial challenge such as that asserted by plaintiff. United Supreme Court cases are not authority for propositions not considered therein. (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 265 ["[T]he 'maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used'"]; *R.A.V. v. City of St. Paul, Minn.* (1992) 505 U.S. 377, 386-387, fn. 5, [it is "contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned"].) Moreover, the Supreme Court in *Lingle* emphasized it was not disturbing any of its prior takings jurisprudence. (*Lingle v. Chevron U.S.A. Inc.*, *supra*, 544 U.S. at

p. 545 ["We emphasize that our holding today that the 'substantially advances' formula is not a valid takings test-does not require us to disturb any of our prior holdings."]; *Kamaole Pointe Development LP v. Hokama* (D. Hawaii 2008) __ F.Supp.2d __, __ ["In abrogating the 'substantially advances' formula for takings purposes, the Court emphasized that it was not disturbing any of its prior holdings."].) Thus, *Lingle* does to abrogate the rule that the *Nollan/Dolan* nexus and rough proportionality test applies only in the context of judicial review of individual adjudicative land use decisions.

Given our analysis, we need not discuss defendants' argument that the waiver and adjustment provisions in municipal code section 9.56.170 bar any relief in light of the holding in *Home Builders Assn. v. City of Napa* (2001) 90 Cal.App.4th 188, 197, 199. Further, we need not address the question of the effect of the city's apparent failure to enforce the charter section 630 requirement that 30 percent of all multi-family-residential housing be permanently affordable and occupied by low and moderate income households on plaintiff's ability to make a facial takings challenge utilizing the *Nollan/Dolan* test. (See *Pennell v. City of San Jose* (1988) 485 U.S. 1, 10; *Poe v. Ullman* (1961) 367 U.S. 497, 507-508.)

B. There Is No Merit To Plaintiff's Argument Ordinance No. 2191 Required State Approval.

Plaintiff argues that Ordinance No. 2191 was a de facto amendment to the city's housing element and thus required approval by the Department of Housing and Community Development. This contention has not merit. Defendants' judicial notice documents indicate the Department of Housing and Community

Development has approved the city's housing element. We conclude the present certification remains effective and no further submission to the Department of Housing and Community Development is warranted.

In preparing a housing element document, Government Code section 65585, subdivision (a) requires that a city or county consider the guidelines adopted by the Department of Housing and Community Development in Health and Safety Code section 50459.[4] Government Code section 65585,

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[4] Health and Safety Code section 50459 states: (a) The department may adopt, and from time to time revise, guidelines for any of the following: [¶] (1) The preparation of housing elements required by Section 65302 and Article 10.6 (commencing with Section 65580) of Chapter 3 of Division 1 of Title 7 of the Government Code. [¶] (2) The preparation of a document that meets both of the following sets of requirements: [¶] (A) Requirements for housing elements pursuant to Section 65302 and Article 10.6 (commencing with Section 65580) of Chapter 3 of Division 1 of Title 7 of the Government Code. [¶] (B) Requirements for the Consolidated Submissions for Community Planning and Development Programs required by Part 91 of Title 24 of the Code of Federal Regulations." [¶] (b) The department shall review housing elements and amendments for substantial compliance with Article 10.6 (commencing with Section 65580) of Chapter 3 of Division 1 of Title 7 of the Government Code and report its findings pursuant to Section 65585 of the Government Code. [¶] (c) On or before April 1, 1995, and annually thereafter, the department shall report to the Legislature on the status of housing elements and the extent to which they comply with the requirements of Article 10.6 (commencing with Section 65580) of Chapter 3 of Division 1 of Title 7 of the Government Code. The department shall also make this report available to any other public agency, group, or person who requests a copy. [¶] (d) The department may, in connection with any loan or grant application submitted to the agency, require submission to the department for review of any housing element and any local housing assistance plan adopted

(continued...)

subdivision (b) requires that 90 days prior to its adoption a proposed housing element must be submitted to the Department of Housing and Community Development. In the case of an amendment to the housing element, the proposed modification must be submitted to the Department of Housing and Community Development 60 days prior to adoption. (Gov. Code, § 65585, subd. (b).) Government Code section 65585, subdivision (c) then requires the Department of Housing and Community Development to find whether the draft or the amendment comply with the requirements imposed by article 10.6 of the Government Code on housing elements. If the Department of Housing and Community Development disapproves the proposed housing element draft or amendment, the city council or board of supervisors may take one of two actions. First, the local legislative body may change the draft or amendment to substantially comply with article 10.6 of the Government Code. (Gov. Code, § 65585, subd. (f)(1).) Second, the city council or board of supervisors may adopt the draft element or amendment without change but only after making a finding that the element or amendment substantially complies with article 10.6 of the Government Code. (Gov. Code, § 65585, subd. (f)(2).) Nothing in Government Code section 65885 requires the Department of Housing and Community Development conduct review of an affordable housing ordinance. Thus, defendants' failure to submit Ordinance No. 2191 to the Department of Housing and Community Development for review was not error. Only housing elements or amendments thereto must

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[4] (...continued)
pursuant to the Housing and Community Development Act of 1974 (Public Law 93-383) [42 U.S.C.A. § 5301 et seq.]."

be submitted to the Department of Housing and Community Development for review. The city's affordable housing ordinance is not a housing element. Municipal code chapter 9.56 does not amend the city's housing element. (*San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 542-543.)

VII. DISPOSITION

The dismissal order is affirmed. Defendants, the City of Santa Monica and its city council, shall recover their costs incurred on appeal from plaintiff, Action Apartment Association.

CERTIFIED FOR PUBLICATION

TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.

Appendix B–1

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CITY OF SANTA MONICA
AND ITS CITY COUNCIL

FILED Jun. 18, 2007

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ACTION APARTMENT ASSOCIATION, a nonprofit corporation,	) CASE NO.: SC 091036
Plaintiff and Petitioner,	) ~~[Proposed]~~ ORDER ON DEMURRER
v.	) Assigned to Department N for all purposes

CITY OF SANTA MONICA, CITY COUNSEL OF THE CITY OD SANTA MONICA, COUNCIL MEMBERS ROBERT T. HOLBROK (MAYOR), BOBBY SHRIVER (MAYOR PRO TEMPORE), PAM O'CONNOR, KEVIN McKEOWN, HERB KATZ, RICHARD BLOOM, AND KEN GENSER, in their official capacities, AND ALL PERSONS INTERESTED IN THE VALIDITY OF THE ORDINANCE NO 2191 AMENDING MUNICIPAL CODE SECTIONS 9.56.050 AND 9.56.060 and DOES 1 through 25,	)
Defendants and Respondents.	)

The demurrer of defendants City of Santa Monica, et al. ("City"), to the complaint and writ of petition of plaintiff came on for hearing in Department N of this Court on June 6, 2007. Alan Seltzer and Barry Rosenbaum appeared on behalf of defendants. Damien M. Schiff appeared on behalf of plaintiff.

Having read and considered the demurrer, the memoranda of points and authority and defendants' Requests for Judicial Notice, and having heard argument of counsel, and for the reasons stated at the hearing on the demurrer by this Court,

IT IS ORDERED THAT:

1. Plaintiff having no objection thereto, defendants' Requests for Judicial Notice, including Exhibits A through M, inclusive, are granted.

2. Plaintiff's second and fourth causes of action are dismissed, plaintiff having conceded in response to defendants' demurrer that (a) the second cause of action should be dismissed because plaintiff has not sought relief under Government Code Section 66020 and the fee allegedly imposed by Ordinance 2191 is not subject to review through a validation action, and (b) the fourth cause of action should be dismissed because plaintiff failed to exhaust administrative remedies under the amended waiver provisions of Ordinance 2191.

3. The demurrer to plaintiff's first cause of action for violation of the takings clauses of the California and United States Constitutions is sustained without leave to amend on the grounds that the decision in *Home Builders Ass'n of Northern California v. City of Napa* (2001) 90 Cal.App.4th 188 ("*Napa*") is controlling. As the Court held in *Napa*, which also involved a facial challenge to a similar inclusionary housing regulatory scheme, heightened scrutiny under *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 ("*Nollan*") and *Dolan v. City of Tigard* (1994) 512 U.S. 374 ("*Dolan*") does not apply in a facial challenge to this generally applicable legislation. In addition, as in *Napa*, Ordinance 2191 contains a waiver provision that provides an opportunity for an aggrieved individual to seek a waiver of the Ordinance to avoid unconstitutional application. Therefore, plaintiff's facial takings claim cannot state a cause of action since the terms of the

challenged legislation allows defendants to avoid an unconstitutional application in individual cases.

4. The demurrer to plaintiff's third cause of action for declaratory relief for alleged violations of Government Code sections 65883 and 65885 is sustained without leave to amend based on defendants' agreement that they have waived and abandoned any argument that the demurrer to this cause of action should be sustained either on the grounds that plaintiff failed to bring this claim by mandate as required by Code of Civil Procedure § 1085 or that, if leave to amend were granted to bring the same claim by mandate, it would be barred by the applicable statute of limitations. Further, based on the agreement of the parties at the hearing, the Court shall treat the third cause of action as a mandate action brought pursuant to Code of Civil Procedure § 1085. Nonetheless, the allegations of the third cause of action fail to state facts sufficient to state a cause of action in that Ordinance 2191 is an Ordinance, not a disguised housing element amendment and, moreover, *Lesher Communications v. Walnut Creek* (1990) 52 Cal. 3d 531, bars this Court from treating Ordinance 2191 as something other than an Ordinance. Furthermore, the third cause of action cannot state a claim that Ordinance 2191 is inconsistent with the City's certified Housing Element since the Legislature has exempted charter cities from the consistency requirement in Government Code § 65803 as explained in *Verdugo Woodlands Homeowners and Residents Association v. City of Glendale* (1986) 179 Cal. App. 3d 696 and *Garat v. City of Riverside* (1991) 2 Cal. App. 4th 259, *overruled on other grounds* in *Morehart v. County of Santa Barbara* (1994) 7 Cal. 4th 725.

5. The demurrer to the fifth cause of action for a writ of mandate enjoining the enforcement of Ordinance 2191 is sustained without leave to amend as it is dependant on the viability of the remaining first and third causes of action, both of which fail to state facts sufficient to state a cause of action for the reasons stated above.

6. The demurrer to the complaint and writ petition have been sustained in its entirety without leave to amend, defendants shall prepare and file a proposed Judgment and Dismissal.

Date: 6/18/07

JOHN A. KRONSTADT
Judge of the Superior Court

Approved as to form:

/s/ Damien M. Schiff
Damien M. Schiff
Attorney for Plaintiff and Petitioner

Appendix C–1

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION: 5

DATE: September 18, 2008

James S. Burling
Pacific Legal Foundation
3900 Lennane Drive, Ste. 200
Sacramento, CA 95834

Action Apartment Association
v.
City of Santa Monica, et al.

B201176
Los Angeles County No. SC091036

THE COURT:

Appellant's petition for rehearing is denied.

cc: File

Appendix D–1

Court of Appeal, Second Appellate District, Div. 5 - No. B201176

S167258

IN THE SUPREME COURT OF CALIFORNIA

En Banc

ACTION APARTMENT ASSOCIATION,
Plaintiff and Appellant,

v.

CITY OF SANTA MONICA et al.,
Defendants and Respondents.

FILED Dec. 10, 2008

The petition for review is denied.

GEORGE
Chief Justice

Santa Monica Municipal Code

Chapter 9.56 AFFORDABLE HOUSING PRODUCTION PROGRAM

9.56.010 Findings and purpose.

The City's affordable housing production program requires developers of market rate multi-family developments to contribute to affordable housing production and thereby help the City meet its affordable housing need. As detailed in the findings supporting the ordinance codified in this Chapter, the requirements of this Chapter are based on a number of factors including, but not limited to, the city's long-standing commitment to economic diversity; the serious need for affordable housing as reflected in local, state, and federal housing regulations and policies; the demand for affordable housing created by market rate development; the depletion of potential affordable housing sites by market-rate development; and the impact that the lack of affordable housing production has on the health, safety, and welfare of the City's residents including its impacts on traffic, transit and related air quality impacts, and the demands placed on the regional transportation infrastructure. (Added by Ord. No. 1918CCS § 1 (part), adopted 7/21/98; amended by Ord. No. 2174CCS § 1, adopted 11/08/05)

9.56.020 Definitions.

The following words or phrases as used in this Chapter shall have the following meanings:

Affordable Housing Fee. A fee paid to the City by a multi-family project applicant pursuant to Section 9.56.070 of this chapter to assist the City in the

production of housing affordable to very low-, low-, and moderate-income households.

Affordable Housing Unit. A housing unit developed by a multi-family project applicant pursuant to Section 9.56.050 or 9.56.060 of this Chapter which will be affordable to very low-, low-, or moderate-income households.

Affordable Housing Unit Development Cost. The city's average cost to develop a unit of housing affordable to low- and moderate income households.

Dwelling Unit. One or more rooms, designed, occupied or intended for occupancy as separate living quarters, with full cooking, sleeping and bathroom facilities for the exclusive use of a single household. Dwelling unit shall include single-room occupancy units as defined in Santa Monica Municipal Code Section 9.04.02.030.790.

Floor Area. Floor area as defined in Santa Monica Municipal Code Section 9.04.020.030.315.

HUD. The United States Department of Housing and Urban Development or its successor.

Income Eligibility. The gross annual household income considering household size and number of dependents, income of all wage earners, elderly or disabled family members, and all other sources of household income.

Industrial/Commercial District. Any district designated in the Santa Monica Zoning Ordinance as a commercial or industrial district.

"Low," "Very Low," and "Moderate" Income Levels. Income levels determined periodically by the

City based on the United States Department of Housing and Urban Development (HUD) estimate of income for a four-person household in the Los Angeles-Long Beach Primary Metropolitan Statistical Area. The major income categories are: "low income" (sixty percent or less of the area median), "ver low-income (fifty percent or less of the area median), and moderate-income (one hundred percent or less of the area median). Adjustment shall be made by household size as established by the City.

Market Rate Unit. A dwelling unit as to which the rental rate or sales price is not restricted by this Chapter.

Maximum Affordable Rent. A monthly housing charge which does not exceed one-twelfth of thirty percent of the maximum very low-, low-, and moderate-income levels as defined in this Chapter and adopted each year by the City. This charge shall represent full consideration for housing services and amenities as provided to market rate dwelling units in the project, whether or not occupants of market rate dwelling units pay separate charges for such services and amenities. Housing services and common area amenities include, but are not limited to, the following: parking, use of common facilities including pools or health spas, and utilities if the project is master-metered. Notwithstanding the foregoing, utility charges, to the extent individually metered for each unit in the project, may be passed through or billed directly to the occupants of affordable housing units in the project in addition to maximum allowable rents collected for those affordable housing units.

Multi-family Project. A multi-family residential development, including but not limited to apartments,

condominiums, townhouses or the multi-family residential component of a mixed use project, for which City permits and approvals are sought.

Multi-family Project Applicant. Any person, firm, partnership, association, joint venture, corporation, or any entity or combination of entities which seeks City development permits or approvals to develop a multi-family project.

Multi-family Residential District. Any district designated in the Santa Monica Zoning Ordinance as a multi-family residential district.

Parcel. Parcel as defined in Santa Monica Municipal Code Section 9.04.02.030.570.

Vacant Parcel. A parcel in a multi-family residential district that has no residential structure located on it as of August 20, 1998 or which had a residential structure locate on it on that date which was subsequently demolished pursuant to a demolition order of the City. No demolition of structures shall be permitted except in accordance with Santa Monica Municipal Code Section 9.04.10.16 et seq. (Added by Ord. No. 1918CCS § 1 (part), adopted 7/21/98; amended by Ord. No. 1926CCS § 1, adopted 10/13/98; Ord. No. 2174CCS § 2, adopted 11/08/08; Ord. No. 2191CCS § 1, adopted 6/13/06)

9.56.030 Applicability of chapter.

(a) The obligations established by this Chapter shall apply to each multi-family project for which a development application was determined complete on or after May 25, 2006 involving the construction of two or more market rate units. No building permit shall be issued for any multi-family project unless such

construction has been approved in accordance with the standards and procedures provided for by this Chapter.

(b) Multi-family projects for which a development application was determined completed prior to May 25, 2006 shall be subject to the provisions of Santa Monica Municipal Code Section 9.56.010 et seq., as they existed on the date the application for the project was determined complete.

(c) A designated landmark building or contributing structure to an adopted Historic District that is retained and preserved on-site as part of a multi-family project shall not be considered or included in assessing any of the requirements under this Chapter. (Added by Ord. No. 1918CCS § 1 (part), adopted 7/21/98; amended by Ord. No. 2191CCS § 2, adopted 6/13/06; Ord. No. 2206CCS § 5, adopted 10/3/06)

9.56.040 Affordable housing obligation.

All multi-family project applicants shall comply with the requirements of this Chapter in the following manner:

(a) Multi-family project applicants for multi-family ownership projects of four or more units in multi-family residential districts shall choose one of the two following options:

(1) Providing affordable housing units on-site in accordance with Section 9.56.050;

(2) Providing affordable housing units off-site in accordance with Section 9.56.060;

(b) In addition to the options established in subsection (a)(1) and (2), all other multi-family project applicants may also choose one of the following options:

(1) Paying an affordable housing fee in accordance with Section 9.56.070;

(2) Acquiring land for affordable housing in accordance with Section 9.56.080.

A multi-family project application will not be determined complete until the applicant has submitted a written proposal which demonstrates the manner in which the requirements of this Chapter will be met. (Added by Ord. No. 1918CCS § 1 (part), adopted 7/21/98; amended by Ord. No. 2191CCS § 3, adopted 6/13/06)

9.56.050 On-site option.

The following requirements must be met to satisfy the on-site provisions of this Chapter:

(a) For ownership projects of at least four units but not more than fifteen units in multi-family residential districts;

The multi-family project applicant agrees to construct at least: (1) twenty percent of the total units as ownership units for moderate-income households, or as an alternative (2) twenty percent of the total units as rental units for low-income households if these rental units are provided by the applicant in accordance with Civil Code Sections 1954.52(b) and 1954.53(a)(2).

(b) For ownership projects of sixteen units or more in multi-family residential districts:

The multi-family project applicant agrees to construct at least (1) twenty-five percent of the total units as ownership units for moderate-income households, or as an alternative, (2) twenty-five percent of the total units as rental units for low-income households if these rental units are provided by the applicant in accordance with Civil Code Sections 1954.52(b) and 1954.53(a)(2).

(c) For all other multi-family applicants:

The multi-family project applicant agrees to construct at least (1) ten percent of the total units of the project for very-low income households or (2) twenty percent of the total units of the project for low income households or (3) one hundred percent of the total units of a project for moderate income households in an Industrial/Commercial District.

(d) Any fractional affordable housing unit that results from the formulas of this Section that is 0.75 or more shall be treated as a whole affordable housing unit (i.e., any resulting fraction shall be rounded up to the next larger integer) and that unit shall also be built pursuant to the provisions of this Section. Any fractional affordable housing unit that is less than 0.75 can be satisfied by the payment of an affordable housing fee for that fractional unit only pursuant to Section 9.56.070(a)(4) or by constructing all the mandatory on-site affordable units with three or more bedrooms. The Planning and Community Development Department shall make available a list of very low-, low-, and moderate-income levels adjusted for household size, the corresponding maximum affordable rents adjusted by number of bedrooms, and the minimum number of very low- or low-income units

required for typical sizes of multi-family projects, which list shall be updated periodically.

(e) The multi-family project applicant may reduce either the size or interior amenities of the affordable housing units as long as there are not significant identifiable differences between affordable housing units and market rate units visible from the exterior of the dwelling units, provided that all dwelling units conform to the requirements of the applicable Building and Housing Codes. However, each affordable housing unit provided shall have at least two bedrooms unless (1) the proposed project comprises at least ninety-five percent one bedroom units, excluding the manager's unit, in which case the affordable housing units may be one bedroom, (2) the proposed project comprises at least ninety-five percent zero bedroom units, excluding the manger's unit, in which case the affordable housing units may be zero bedroom units, (3) the proposed project comprises zero and one bedroom units, excluding the manager's unit, in which case the affordable housing units must be at least one bedroom units, or (4) the multi-family project applicant has elected not to pay the affordable housing fee pursuant to Section 9.56.070(a)(4), in which case the affordable housing units must be at least three bedroom units. The design of the affordable housing units shall be reasonably consistent with the market rate units in the project. An affordable housing unit shall have a minimum total floor area, depending upon the number of bedrooms provided, no less than the following:

500 square feet

0 bedrooms

1 bedroom	600 square feet
2 bedrooms	850 square feet
3 bedrooms	1080 square feet
4 bedrooms	1200 square feet

Affordable housing units in multi-family projects of one hundred units or more must be evenly disbursed throughout the multi-family project to prevent undue concentrations of affordable housing units.

(f) All affordable housing units in a multi-family project or a phase of a multi-family project shall be constructed concurrently with the construction of market rate units in the multi-family project or phase of that project.

(g) On-site affordable housing units must be rental units in rental projects. In ownership projects, these affordable housing units may be either rental units or ownership units. Affordable housing ownership units shall comply with requirements concerning sales price, monthly payment, and limited equity and resale restrictions as established by resolution of the City Council to ensure that subsequent purchasers are also income-qualified households.

(h) Each multi-family project applicant, or his/her successor, shall submit an annual report to the City identifying which units are affordable units, the monthly rent (or total housing cost if an ownership unit), vacancy information for each affordable unit for the prior year, verification of income of the household occupying each affordable unit throughout the prior year, and such other information as may be required by City staff.

(i) A multi-family project applicant who meets the requirements of this Section shall be entitled to the density bonus development standards established in Santa Monica Municipal Code Section 9.04.10.14.040.

(j) All residential developments providing affordable housing on-site pursuant to the provisions of this Section shall receive priority building department plan check processing by which housing developments shall have plan check review in advance of other pending developments to the extent authorized by law. (Added by Ord. No. 1918CCS § 1 (part), adopted 7/21/98; amended by Ord. No. 2191CCS § 4, adopted 6/13/06)

9.56.060 Off-site option.

The following requirements must be met to satisfy the off-site option of this Chapter:

(a) The multi-family project applicant for ownership projects of four or more units in multi-family residential districts shall agree to construct twenty-five percent more affordable housing units than number of affordable housing units required by Section 9.56.050(a) and (b).

(b) For all other multi-family project applicants, the applicant shall agree to construct the same number of affordable housing units as specified in Section 9.56.050(c).

(c) The multi-family project applicant shall identify an alternate site suitable for residential housing which the project applicant either owns or has site control over (e.g., purchase agreement, option to purchase, lease) subject to City review to ensure that

the proposed development is consistent with the City's housing objectives and projects.

(d) The off-site units shall be located within a one-quarter mile radius of the market rate units.

(e) The off-site units shall satisfy the requirements of subsections (d) through (j) of Section 9.56.050.

(f) The off-site units shall not count towards the satisfaction of any affordable housing obligation that development of the alternative site with market rate units would otherwise be subject to pursuant to this Chapter.

(g) Exceptions to the location of the off-site units specified in this Section may be granted by the Planning Commission on a case-by-case basis upon a showing by the multi-family project applicant, based upon substantial evidence, that the location of off-site units in a location different from that specified in this Section better accomplishes the goals of this Chapter, including maximizing affordable housing production and dispersing affordable housing throughout the City.

(h) The Housing Division of the Resource Management Department shall prepare administrative guidelines to implement this Section. (Added by Ord. No. 1918CCS § 1 (part), adopted 7/21/98; amended by Ord. No. 2191CCS § 5, adopted 6/13/06)

9.56.070 Affordable housing fee.

A multi-family project applicant eligible to meet the affordable housing obligations established by this Chapter by paying an affordable housing fee shall pay the fee in accordance with the following requirements:

(a) An affordable housing fee may be paid in accordance with the following formulas:

(1) Multi-family projects in Multi-family Residential Districts;

Affordable housing unit base fee x floor area of multi-family project;

(2) Multi-family projects in Multi-family Residential Districts on vacant parcels:

Affordable housing unit base fee x floor area of multi-family project x seventy-five percent;

(3) Multi-family projects in Industrial/ Commercial Districts on parcels that are either not already developed with multi-family housing or are already developed with multi-family housing, but the multi-family project preserves the existing multi-family housing or a Category C removal permit has been obtained for the existing multi-family housing:

Affordable housing unit base fee x floor area of project devoted to residential uses x fifty percent.

(4) Multi-family projects with factional affordable housing units of less than 0.75 based on the formula established in Section 9.56.050(d):

City's affordable housing unit development cost x fractional percentage.

(b) For purposes of this Section, the affordable housing unit base fee shall be established by resolution of the City Council. Commencing on July 1, 2006 and on July 1st of each fiscal year thereafter, the affordable housing unit base fee shall be adjusted based on changes in construction costs and land costs. No later than July 1, 2010, and approximately every five year

period thereafter, the City will conduct a comprehensive study of these fees and the results of the comprehensive study shall be reported to the City Council. The amount of the affordable housing fee that the multi-family project applicant must pay shall be based on the affordable housing unit base fee resolution in effect at the time that the affordable housing fee is paid to the city.

(c) For purposes of this Section, the City's affordable housing unit development cost shall be established by resolution of the City Council. Commencing on July 1, 2007 and on July 1st of each fiscal year thereafter, the City's affordable housing unit development cost shall be adjusted based on changed in construction costs and land costs. No later than July 1, 2010 and approximately every five years period thereafter, the City will conduct a comprehensive study of these fees and the results of the comprehensive study shall be reported to the City Council. The affordable housing fee that the multi-family project applicant must pay shall be based on the affordable housing unit development cost resolution in effect at the time of payment to the City.

(d) The amount of the affordable housing unit base fee may vary by product type (apartment or condominium) and shall reflect, among other factors, the relationship between new market rate multi-family development and the need for affordable housing.

(e) The affordable housing fee shall be paid in full to the City prior to the City granting any approval for the occupancy of the project, but no earlier than the time of building permit issuance.

(f) The City shall deposit any payment made pursuant to this Section in a reserve account separate from the General Fund to be used only for development of very low- and low-income housing, administrative costs related to the production of this housing, and monitoring and evaluation of this affordable housing production program. Any monies collected and interest accrued pursuant to this Chapter shall be committed within five years after the payment of such fees or the approval of the multi-family project, whichever occurs later. Funds that have not been appropriated within this five-year period shall be refunded on a pro rata share to those multi-family project applicants who have paid fees during the period. Expenditures and commitments of funds shall be reported to the City Council annually as part of the City budget process.

(g) An affordable housing fee payment pursuant to this Section shall not be considered provision of affordable housing units for purposes of determining whether the multi-family project qualifies for a density bonus pursuant to Government Code section 65915. (Added by Ord. No. 1918CCS § 1 (part), adopted 7/21/98; amended by Ord. 1926CCS § 2, adopted 10/13/98; Ord. No. 2174CCS § 3, adopted 11/8/05; Ord. No. 2191CCS § 6, adopted 6/13/06)

9.56.080 Land acquisition.

A multi-family project applicant may meet the affordable housing obligations established by this Chapter by making an irrevocable offer: (a) dedicating land to the City of a non-profit housing provider, (b) selling of land to the City or a non-profit housing provider at below market value, or (c) optioning of land on behalf of the City or a non-profit housing provider. Each of these options must be for a value at least

equivalent to the affordable housing obligation otherwise required pursuant to this Section. The multi-family project applicant must identify the land at the time that the development application is filed with the City. Any land offered pursuant to this application demonstrates that locating the land outside of this radius better accomplishes the goals of this Chapter, including maximizing affordable housing production and dispersing affordable housing throughout the City. The City may approve, conditionally approve or reject such offers subject to administrative guidelines to be prepared by the Housing Division of the Resources Management Department. If the City rejects such offer, the multi-family project applicant shall be required to meet the affordable housing obligation by other means set forth in this Chapter. (Added by Ord. No. 1918CCS § 1 (part), adopted 7/21/98)

9.56.090 Fee waivers.

The Condominium and Cooperative Tax described in Section 6.76.010 of the Santa Monica Municipal Code and the Park and Recreation Facilities Tax established in Chapter 6.80 of Article 6 of the Santa Monica Municipal Code shall be waived for required affordable housing units and for low and very low income dwelling units developed by the City or its designee using affordable housing fees. However, any multifamily project applicant who elects to pay an affordable housing fee shall not be eligible for any fee waiver under this Section. (Added by Ord. No. 1918CCS § 1 (part), adopted 7/21/98)

9.56.100 Pricing requirements for affordable housing units.

The City Council shall, by resolution, on an annual basis, set maximum affordable rents and maximum affordable purchase prices for affordable housing units, adjusted by the number of bedrooms. Such maximum affordable rents shall be set at rates such that qualified occupants for low-income units pay monthly rent that does not exceed thirty percent of the gross monthly household income for households earning sixty percent of the median income and that qualified occupants for very low income units pay monthly rent that does not exceed thirty percent of the gross monthly household income for households earning fifty percent of the median income. Such maximum affordable purchase price shall be set at rates such that qualified occupants for low income units pay total monthly housing costs (mortgage payment, property taxes, homeowners' insurance, property mortgage insurance, homeowners' association fees) that do not exceed thirty-eight percent of the gross monthly household income for households earning sixty percent of the median income and that qualified occupants for very low-income units pay total monthly housing costs (mortgage payment, property taxes, homeowners' insurance, property mortgage insurance, homeowners' association fees) that do not exceed thirty-eight percent of the gross monthly household income for households earning fifty percent of the median income. (Added by Ord. No. 1918CCS § 1 (part), adopted 7/21/98)

9.56.110 Eligibility requirements.

(a) Only low-income and very low-income households shall be eligible to occupy or own and

occupy affordable housing units. The City shall develop a list of income-qualified households. Multi-family project applicants shall be required either to select households from the City-developed list of income-qualified households or to themselves select income-qualified households which shall be subject to eligibility certification by the City.

(b) The City shall develop administrative guidelines for the tenant and purchaser selection process detailed in this Section, which shall establish, at a minimum, the timing by which affordable housing units in a project must be leased or sold and occupied, both initially after issuance of the certificate of occupancy for the project and upon subsequent vacancies in the affordable housing unit. The guidelines may also establish priorities for income-qualified tenants.

(c) The following individuals, by virtue of their position or relationship, are ineligible to occupy an affordable housing unit:

(1) All employees and officials of the City of Santa Monica or its agencies, authorities, or commissions who have, by the authority of their position, policy-making authority or influence over the implementation of this Chapter and the immediate relatives and employees of such City employees and officials;

(2) The immediate relatives of the applicant or owner, including spouse, children, parents, grandparents, brother, sister, father-in-law, mother-in-law, son-in-law, daughter-in-law, aunt, uncle, niece, nephew, sister-in-law, and brother-in-law. (Added by Ord. No. 1918CCS § 1 (part), adopted 7/21/98)

9.56.120 Relation to units required by Rent Control Board.

Very low-income and low-income dwelling units developed as part of a market rate project, pursuant to replacement requirements of the Santa Monica Rent Control Board, shall count towards the satisfaction of this Chapter if they otherwise meet applicable requirements for this Chapter including, but not limited to, the income eligibility requirements, deed restriction requirements, and pricing requirements. New inclusionary units required by the Rent Control Board which meet the standards of this Chapter shall count towards the satisfaction of this Chapter. (Added by Ord. No. 1918CCS § 1 (part), adopted 7/21/98)

9.56.130 Deed restrictions.

Prior to issuance of a building permit for a project meeting the requirements of this Chapter by providing affordable units on-site or off-site, the multi-family project applicant shall submit deed restrictions or other legal instruments setting forth the obligation of the applicant under this Chapter for City review and approval. Such restrictions shall be effective for at lest fifty-five years. (Added by Ord. No. 1918CCS § 1 (part), adopted 7/21/98)

9.56.140 Enforcement.

No building permit or occupancy permit shall be issued, nor any development approval granted, for a project which is not exempt and does not meet the requirement of this Chapter. All affordable housing units shall be rented or owned in accordance with this Chapter. (Added by Ord. No. 1918CCS § 1 (part), adopted 7/21/98)

9.56.150 Annual report.

The Housing Division of the Resource Management Department shall submit a report to the City Council on an annual basis which shall contain information concerning the implementation of this Chapter. This report shall also detail the projects that have received planing approval during the previous year and the manner in which the provisions of this Chapter were satisfied. This report shall further asses whether the provisions of Proposition R have been met and whether changes to this Chapter or its implementation procedures are warranted. In the event the provisions of Proposition R have not been met, the City Council shall take such action as is necessary to ensure that the provisions will be met in the future. This action may include, but not be limited to, amending the provisions of this Chapter or its implementation. (Added by Ord. No. 1918CCS § 1 (part), adopted 7/21/98)

9.56.160 Principles and guidelines.

(a) In addition to the administrative guidelines specifically required by the provisions of this chapter, the City Manager or his or her designee shall be the designated authority to develop and implement rules and regulations pertaining to this Chapter, to enter into recorded agreements with multi-family project applicants, and to take other appropriate steps necessary to assure that the required affordable housing units are provided and are occupied by very low- and low-income households.

(b) Within one year from the passage of this Chapter, administrative rules and regulations pertaining to this Chapter shall be brought before the

City Council for adoption. (Added by Ord. No. 1918CCS § 1 (part), adopted 7/21/98)

9.56.170 Adjustments or waivers.

(a) A multi-family project applicant may request that the requirements of this Chapter be adjusted or waived based on a showing that applying the requirements of this Chapter would effectuate an unconstitutional taking of property or otherwise have an unconstitutional application to the property.

(b) To receive an adjustment or waiver, the applicant must submit an application to the Director of Resource Management, or his/her designee, at the time the applicant files a multi-family project application. The applicant shall bear the burden of presenting substantial evidence to support the request and set forth in detail the factual and legal basis for the claim, including all supporting technical documentation.

(c) In making a determination on an application to adjust or waive the requirements of this Chapter, the Director of Resource Management, or City Council on appeal, may assume each of the following when applicable:

(1) The applicant is subject to the affordable housing requirement of this Chapter;

(2) The applicant will benefit from the inclusionary incentives set forth in this Chapter and the City's Municipal Code;

(3) The applicant will be obligated to provide the most economical affordable housing units feasible in terms of construction, design, location and tenure.

(d) The Director of Resource Management shall render a written decision within ninety days after a complete application is filed. The Director's decision may be appealed to the City Council if such appeal is filed within fourteen consecutive calendar days from the date that the decision is made in the manner provided in Part 9.04.20.24, Sections 9.04.20.24.010 through 9.04.20.24.040 of this Code.

(e) If the Director of Resource Management, or City Council on appeal, upon legal advice provided by or at the behest of the City Attorney, determines that applying the requirements of this Chapter would effectuate an unconstitutional taking of property or otherwise have an unconstitutional application to the property, the affordable housing requirements shall be adjusted or waived to reduce the obligations under this Chapter to the extent necessary to avoid an unconstitutional result. If an adjustment or waiver is granted, any change in the use within the project shall invalidate the adjustment or waiver. If the Director, or City Council on appeal, determines that no violation of the United States or California Constitutions would occur through application of this Chapter, the requirements of this Chapter remain fully applicable. (Added by Ord. No. 2174CCS § 4, adopted 11/8/05; amended by Ord. No. 2207CCS § 10, adopted 10/3/06)

9.04.10.08.030 General provisions.

No use permitted by this Chapter occupying all or part of a parcel or building site shall be permitted unless off-street parking spaces are provided in an amount and under the conditions designated by the provisions of this Part.

(a) In this Part, the word "use" shall refer to the type of use, the extent of the use, and a change in use either in type or extent.

(b) Any existing lawful use may continue so long as the number of off-street parking spaces provided for the use is not reduced below the requirements of this Part or below the number of off-street parking spaces required at the time the use was legally established, whichever is less.

(c) No building or structure shall be constructed or moved onto a site unless off-street parking spaces in an amount and under the conditions set forth in this Part are provided for the use proposed for the building or structure.

(d) Additional parking spaces in the number specified in Section 9.04.10.08.040 shall be provided for any new floor area added to an existing structure which results in a greater parking requirement.

(e) Every change of use in an existing building or structure shall conform to the following requirements:

(1) For any new use of an existing non-residential building or structure such that the new use will require a greater number of parking spaces as compared to the previous use, parking spaces in the number specified in Section 9.04.10.08.040 shall be provided for the new use. If there has been no legal use

of the existing commercial or industrial building or structure for over twelve months, no additional parking shall be required for any permitted new use which requires a parking standard no more intense than one space per three hundred square feet in commercial districts, or one space per four hundred square feet in industrial districts;

(2) For any new commercial, cultural, health, industrial, or commercial entertainment and recreation use of an existing residential building or structure, parking spaces in the number specified in Section 9.04.10.08.040 shall be provided for the entire parcel;

(3) For any new residential or educational use of an existing residential building or structure such that the new residential or educational use will require a greater number of parking spaces as compared to the previous use, parking spaces in the number specified in Section 9.04.10.08.040 shall be provided for the new use. If there has been no legal use of the existing residential building or structure for over six months, no additional parking shall be required for any permitted new residential or educational use provided that the number of required parking spaces does not exceed the number of spaces required for the last legal use.

(f) Requirements for uses not specifically listed in this Part shall be determined by the Zoning Administrator and the City Parking and Traffic Engineer based upon the requirements for comparable uses and upon the particular characteristics of the use.

(g) Required guest parking in residential districts shall be designated as such and restricted to the use of guests.

(h) Walls, hedges, fences, and landscaping within parking areas shall comply with the provisions of Part 9.04.10.04.

(i) Fractional space requirements totaling 0.5 or above shall be rounded up to the next whole space.

(j) For purposes of calculating off-street parking requirements for dwelling units, all private living spaces including but not limited to dens, studios, family rooms, studies and lofts shall be considered as "bedrooms" except that a maximum of one such room per unit shall not count as a bedroom if it is less than one hundred square feet in area. Kitchens, bathrooms and one living room per unit shall not be considered bedrooms. Semiprivate rooms shall not count as bedrooms if they have no doors and a minimum seven-foot opening to adjacent living space. A loft or mezzanine shall not count as a bedroom if the maximum width of the loft or mezzanine is less than seven feet.

(k) Unless otherwise specified, the floor areas used to calculate the number of off-street parking spaces required for non-residential uses pursuant to the provisions of Section 9.04.10.08.040 shall include:

(1) All floor area located below grade devoted to office, retail, service, or other activities and uses, storage areas, restrooms, lounges, lobbies, kitchens, and interior hallways and corridors, unless exempted by the Chapter;

(2) All outdoor patio, deck, balcony, terrace, or other outdoor area that will accommodate a permanent activity that will generate a demand for parking facilities in addition to that which is provided for

principal activities and uses within the building or structure;

(3) Floor area devoted to parking shall not be included when determining required parking;

(l) A parking demand analysis may be required if it is deemed necessary by the Parking and Traffic Engineer and Zoning Administrator. The analysis shall be paid for by the developer. In the event the analysis shows parking requirements greater than required by this Part, the Parking and Traffic Engineer and Zoning Administrator shall require such additional parking as is required by the analysis.

(m) The provisions of Section 9.04.10.08.040 of this Chapter shall not apply if the subject property is located within the City's Parking Assessment District.

(n) If a project contains more than one use, the parking requirement for each use shall be calculated separately based on the standards contained in Section 9.04.10.08.040 of this Chapter, unless otherwise permitted by this Chapter. (Prior code § 9044.3; amended by Ord. No. 1705CCS § 11 (part), adopted 9/21/93)

9.04.16.01.030 Minimum requirements.

Except as otherwise provided by law, the following minimum requirements shall be imposed on any condominium project:

(a) Residential Parking. Off-street parking shall be provided pursuant to standards for new construction in Part 9.04.10.08. Required off-street parking spaces shall be covered and located within the same structure as the dwelling units for which they are required and shall be included in the ownership of each condominium unit. No off-street parking space required by this Section shall be sold, leased, or otherwise transferred to the control of any person or organization not an owner of one or more units within the project except that spaces may be rented to other owners within the project.

* * * *

125 (2) No. 08-1139

FILED
APR 6 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

ACTION APARTMENT ASSOCIATION,

Petitioner,

v.

CITY OF SANTA MONICA, CITY COUNCIL OF THE CITY OF SANTA MONICA, COUNCIL MEMBERS ROBERT T. HOLBROOK (MAYOR), BOBBY SHRIVER (MAYOR PRO TEMPORE), PAM O'CONNOR, KEVIN McKEOWN, HERB KATZ, RICHARD BLOOM, and KEN GENSER, in their official capacities, and ALL PERSONS INTERESTED IN THE VALIDITY OF ORDINANCE NO. 2191 AMENDING MUNICIPAL CODE SECTIONS 9.56.050 AND 9.56.060,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal

BRIEF IN OPPOSITION

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April 6, 2009

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QUESTIONS PRESENTED

1. Does Petitioner trade association have a ripe takings claim under the Fifth Amendment of the United States Constitution, when neither it nor its members have requested a waiver or adjustment of the affordable housing requirements of Ordinance 2191 under provisions of the Santa Monica Municipal Code, which allows for the avoidance of the Ordinance's potential unconstitutional application in individual cases?

2. Is a facial Fifth Amendment takings claim against an inclusionary housing ordinance subject to review under the "essential nexus" and "rough proportionality" tests enunciated in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) ("*Nollan*") and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) ("*Dolan*"), when the ordinance does not require a landowner to pay money or convey a possessory interest in real property to the City, but instead requires the developer of a multi-unit residential project to set aside a certain percentage of new units for rent or sale at a reduced price and when there is no claim that the property has lost all economic value?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions identified by Petitioner, the text of the challenged Santa Monica City Council Ordinance No. 2191, omitted by Petitioner, and Ordinance Nos. 2174 and 2180, adopted in concert therewith. These Ordinances are in the record below; pertinent parts of Ordinance Nos. 2174 and 2180 are reproduced in Appendix A and B, respectively.

STATEMENT OF THE CASE

The City of Santa Monica ("City") presents the following Statement of the Case in response to misstatements of fact and law in the Statement presented by Petitioner.

A. BACKGROUND TO ADOPTION OF ORDINANCE 2191

California imposes on local governments the responsibility to make adequate provision for the housing needs of persons of very low, low and moderate income levels. Cal. Gov. Code §65580, §65580(d), §65583(c), §65584. The state legislature has required numerous incentives to facilitate and expedite the construction of affordable housing, including the state's density bonus law. Cal. Gov. Code §65915; §65582.1. The City meets its responsibility to develop affordable housing in part through

implementation of Santa Monica Municipal Code ("SMMC") Chapter 9.56, the City's Affordable Housing Production Program ("AHPP"). Pet. App. E.

In May 2005, in response to a review of the AHPP, the City commenced proceedings which ultimately led to three separate but related legislative acts. First, in November 2005, the City Council adopted Ordinance 2174. Pet. App. A-13. Pertinent to the petition for certiorari, Ordinance 2174 added the first iteration of SMMC §9.56.170(a), which provided: "A multi-family project applicant may request that the requirement of this Chapter be adjusted or waived based on a showing that applying the requirements of this Chapter would effectuate an unconstitutional taking of property." Resp. App. A; [RA Vol. I:231]. Thus, contrary to Petitioner's representation (Petition at 5), the AHPP waiver and adjustment provision was available before Petitioner filed its complaint and petition on September 11, 2006.[1]

Next, in April 2006, the City Council adopted Ordinance 2180, modifying the City's density bonus

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[1] SMMC §9.56.170(a) was amended October 3, 2006, to broaden the authority to grant adjustments to or waivers of Ordinance 2191 where it would "otherwise have an unconstitutional application to a property." Pet. App. E-20. Petitioner agreed to the dismissal of its fourth cause of action for substantive due process violations below because it failed to exhaust administrative remedies under this amended waiver provision. Pet. App. B-3, ¶2.

law to align it with changes in the state's density bonus law. Resp. App. B; [RA Vol. II:319-346].[2] As discussed further below, the City enhanced the regulatory concessions, incentives, and bonuses accorded projects containing affordable housing in anticipation of the adoption of Ordinance 2191. For example, while state density bonus law applies to development of five or more units, the City provides density bonuses as a matter of right to any multi-family ownership project with four or more units that provides affordable housing on-site in compliance with the AHPP. Pet. App. E-10; SMMC §9.56.050(i). Only after these actions were taken, did the City Council adopt Ordinance 2191.

Finally, all of these legislative enactments were informed by an extensive, updated 2005 "Nexus" Study the City prepared that demonstrates the impact of new market rate multi-family developments on the need for affordable housing. Pet. App. A-13; [RA Vol. I:100-170].

B. ORDINANCE 2191

Petitioner exaggerates the requirements of Ordinance 2191. The Ordinance does not broadly

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[2] Density Bonus laws reward a developer who agrees to build a certain percentage of low- or moderate-income housing with the opportunity to build more residences than would otherwise be permitted by applicable local regulations. *Shea Homes Ltd. Partnership v. County of Alameda*, 2 Cal.Rptr.3d 739, 753 (2003).

mandate on-site or off-site development of affordable housing units in conjunction with "market rate housing unit construction." Petition at 5. It is narrowly tailored. The challenged portions of Ordinance 2191 apply only to multi-family ownership projects of four or more units in multi-family residential zone districts, where the City found affordable ownership housing was not being produced. SMMC §9.56.040(a). For multi-family ownership projects subject to its terms, Ordinance 2191 requires a percentage of affordable housing units on-site (SMMC §9.56.050) or off-site (SMMC §9.56.060) as part of the project as a whole, subject to a waiver and adjustment procedure to avoid unconstitutional application (SMMC §9.56.170(a)), and with substantial incentives available under Ordinance 2180.[3]

Ordinance 2191 does not require developers to transfer ownership of required affordable units to third persons for the benefit of the City's housing policies. Petition at 5. Instead, just like the mobile-home park owner in *Yee v. City of Escondido*, 503 U.S. 519, 531 (1992) ("*Yee*"), developers of multi-family ownership projects subject to Ordinance 2191 already voluntarily open their property to others; they are in the business of selling or renting condominium units. They are not forced to sell or rent to strangers. They

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[3] Although Petitioner attached the entirety of Chapter 9.56 as Appendix E to its Petition, its taking claim challenges Ordinance 2191 and, more particularly, only its amendments to sections 9.56.040, 9.56.050 and 9.56.060.

operate in that precise business by virtue of their own volition. Ordinance 2191 provides that they may select the income-qualified households to whom they sell or rent affordable units. Pet. App. E-17; SMMC §9.56.110(a).

The on-site provisions of §9.56.050(a) for ownership projects between four and fifteen units require a project applicant to construct at least twenty percent (20%) of the total units as *ownership units* for moderate-income households. As an alternative option that twenty percent (20%) of the total units may be provided as *rental units* for low-income households. Pet. App. E-6; SMMC §9.56.050(a). For ownership projects of 16 units or more, this on-site percentage increases to twenty-five (25%) for both options. *Ibid*; §9.56.050(b). The targeted household income (e.g. very-low, low, or moderate) for affordable units is important to the developer as it determines the number of market rate density bonus units to which a project developer is entitled under City and state law.[4]

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[4] In the multi-family residential districts subject to Ordinance 2191, the 20% on-site affordable housing requirement entitles the project applicant to a 15% density bonus if the affordable unit(s) are for moderate income households, and a 35% density bonus if made available to lower-income households. Resp. App. B-3, -5, §2(d). In calculating a density bonus, the law provides " . . . any calculation resulting in a fractional number shall be rounded upwards to the next whole number." Resp. App. B-3, §2(c)(3). Thus, a typical five-unit project with one moderate-income unit is entitled to one market-rate density

(Continued on following page)

Petitioner inflates the requirements that must be met if a developer chooses to satisfy the AHPP through the off-site option of §9.56.060(a). This section requires applicants "to construct twenty-five percent more affordable housing units than number of affordable housing units required by Section 9.56.050(a) and (b)." This calculation is not an aggregate additional 25% which would bring the total to 45% or 50% depending on project size as Petitioner asserts. Petition at 5. Rather, it is a 25% multiplier of the base on-site affordable requirement. Pet. App. E-10; SMMC §9.56.060(a).[5]

Petitioner's statement that developers "must also dedicate off-street, covered parking for the low income units" is false. Petition at 5. As stated above, SMMC §9.56.050(i) entitles affordable housing developers to regulatory concessions (Pet. App. E-10), which include "By-Right Parking Incentives" that allow parking to be "provided through tandem or uncovered parking." Resp. App. B-8, §g. In addition to by-right parking incentives, project applicants subject to Ordinance 2191 are entitled up to three other incentives

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bonus unit, while a five-unit project with one low-income unit is entitled to two additional market-rate units.

[5] For example, if a developer proposed to build five units and satisfy the affordable obligation off-site, the 20% onsite requirement of one unit would be multiplied by 25% (1 x .25) to obtain the sum of .25 additional units. Because this fraction falls below .75, the total number of ownership units affordable to moderate-income households that satisfies the affordable housing obligation entirely off-site would remain one unit.

or regulatory concessions (such as zoning modifications), and may seek a modification of any development standard that could preclude "the construction of a density bonus housing development at the densities or with the concessions permitted by this Section." Resp. App. B-9-11, §h(2); Resp. App. B-11-12, §n. Under Ordinance 2191, project developers also receive priority in having their building plans checked and processed. Pet. App. E-10; SMMC §9.56.050(j).

Petitioner's Statement of the Case ignores these offsetting benefits and incentives available by right to developers who construct affordable housing under Ordinance 2191. Petitioner's omission is understandable. The density bonus, project incentive and waiver provisions of these ordinances belie Petitioner's argument that inclusionary housing ordinances "force developers to swallow the costs of providing below market rates." Petition at 13.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE RIPENESS DOCTRINE PROVIDES AN ALTERNATIVE GROUND FOR DECISION PRESENTED TO THE COURTS BELOW TO AFFIRM THE JUDGMENT

To pursue its facial challenge to Ordinance 2191, Petitioner must first demonstrate that Ordinance 2191 will be invalid "no matter how it is applied." *Yee,*

supra, 503 U.S. at 534; *see also City of Chicago v. Morales*, 527 U.S. 41, 78-79 (1999), Justice Scalia dissenting ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the *challenger must establish that no set of circumstances exists under which the Act would be valid.*") (Italics in original). Because Ordinance 2191 allows for waiver of its requirements to avoid unconstitutional application in individual cases, Petitioner cannot satisfy this prerequisite. As the trial court recognized in granting the City's demurrer on this ground, Petitioner cannot show that Ordinance 2191 will result in an uncompensated taking in every situation and no matter how it is applied; for if a waiver of the Ordinance is granted, there cannot be a taking. Pet. App. B-3, ¶3. Thus, the petition should be denied solely because this case is unripe for judicial review.

II. THIS CASE DOES NOT SQUARELY RAISE THE QUESTION PRESENTED BY PETITIONER

A. THERE IS NO "EXACTION" WITHIN THE PURVIEW OF *NOLLAN* AND *DOLAN* PRESENT IN THIS CASE

Because Ordinance 2191 does not exact an interest in real property comparable to a *per se* taking, this case presents only an advisory question whether such an exaction can be imposed legislatively and be subject to a Fifth Amendment takings claim reviewed under *Nollan* and *Dolan*. Indeed, the absence of a *per*

se taking stands in the way of this Court ever reaching the question presented by Petitioner.

In *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 538 (2005) ("*Lingle*"), this Court clarified that "outside two relatively narrow categories of regulatory action generally deemed *per se* takings" – permanent physical invasion (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) ("*Loretto*")) and denial of all economically beneficial use of property (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) ("*Lucas*")) – "and the special context of land-use exactions," regulatory takings challenges are governed by the multi-pronged standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) ("*Penn Central*"). In doing so, the Court made clear that *Nollan* and *Dolan* retain validity under the Takings Clause as a special type of *per se* physical taking. *Lingle, supra*, at 546-547.[6]

Ordinance 2191 does not result in the permanent physical occupation of land as required by *Loretto* to constitute a *per se* physical taking. In a condominium project subject to Ordinance 2191, housing units

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[6] The Court explained that the rule established by *Nollan* and *Dolan* in "the special context of land-use exactions" (*id.* at 538) was "entirely distinct from the 'substantially advances' test" (*id.* at 547) by describing the dedications of real property required in these cases as being so onerous that, outside the adjudicatory exactions context, they would have been deemed a *per se* physical taking. *Id.* at 546-547.

are sold or rented as part of a development project voluntarily undertaken by the property owner, the same as in any other development. While the sale or rental price may be lowered to make some units affordable to lower income potential buyers or renters, such market regulation does not violate the Fifth Amendment. Transfers of wealth from one private party to another are not *per se* takings. "Traditional zoning regulations can transfer wealth . . . but the existence of the transfer in itself does not convert regulation into physical invasion." *Yee*, *supra*, 503 U.S. at 529-530; *see also Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986). Thus, Petitioner's formulation that Ordinance 2191 requires "owners to transfer ownership of required affordable units to third persons for the benefit of the City's housing policies" fails as a *per se* exaction. As in *Yee* "[b]ecause they voluntarily open their property to occupation by others, petitioners cannot assert a *per se* right to compensation based on their inability to exclude particular individuals." *Yee*, *supra*, 503 U.S. at 531.[7]

Nor do the challenged sections of Ordinance 2191 amount to an economic *per se* taking required by

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[7] "When a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge, *or require the landowner to accept tenants he does not like*, without automatically having to pay compensation." *Yee*, *supra*, 503 U.S. at 529 (citations omitted; emphasis added).

Lucas. While the transfer of affordable units to qualified purchasers or renters may reduce sales income from those units as opposed to market rate units, even such a potential diminution of income from individual affordable units does not wipe out all economic gain. Takings jurisprudence looks at the parcel-as-a-whole in evaluating the economic impact of a regulation on a property owner. Petitioner cannot divide a parcel into discrete segments and then attempt to argue that the splintered rights in a particular segment have been entirely abrogated. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning*, 535 U.S. 302, 327 (2002) ("*Tahoe-Sierra*"); *Penn Central*, *supra*, 438 U.S. at 130-131.

Thus, Petitioner's mischaracterization of Ordinance 2191's affordable housing requirement as an exaction of individual affordable units is flawed because, when viewed as a whole, any affected property includes market-rate, density bonus market-rate and, as a smaller subset, affordable units. At most, depending on the application of Ordinances 2191 and 2180, the AHPP may have some hypothetical potential to reduce sales or rental income from a condominium project subject to its terms, but that does not amount to a *per se* taking. As noted in *Lucas*, *supra*, 505 U.S. at 1020, the *per se* "total taking" rule is inapplicable where land retains some value, even where the challenged regulation prohibits all development. *See also Tahoe-Sierra*, *supra*, 535 U.S. at

330, 332 (anything less than a "complete elimination of value," or a "total loss," requires the kind of analysis applied in *Penn Central*).

As *Lingle* and *Tahoe-Sierra* instruct, if Petitioner wanted to challenge Ordinance 2191 on Fifth Amendment grounds, it should have done so under *Penn Central*. Petitioner failed to bring such a regulatory takings challenge and, therefore, has waived any claim for review by this Court on those grounds.

B. THE DECISION BELOW IS NOT SUITABLE TO REVIEW THE CONFLICT AMONG THE CASES CITED BY PETITIONER

This case is a particularly poor vehicle to resolve the question Petitioner urges – whether heightened scrutiny under *Nollan* and *Dolan* applies to "legislative exactions." Not one of the cases cited by Petitioner as examples of the conflict in how courts treat legislative and adjudicative exactions involved an inclusionary housing ordinance. None of Petitioner's cases addressed an ordinance that provided for waiver or adjustment of its requirements; much less the offsetting significant benefits provided by Ordinances 2191 and 2180. Furthermore, in all of the cases Petitioner cites the "exaction" or property interest at issue involved either some form of monetary

exaction,[8] or the dedication of an interest in real property to a governmental agency.[9]

In contrast, there is no monetary exaction at issue in this case. There are no property dedication requirements that result in the transfer of a property interest tantamount to the physical occupation of land as in the cases Petitioner presents as examples of "legislative exactions." Ordinance 2191 does not authorize the physical invasion of property identified in *Amoco Oil Company*, *supra*, in which dedication of twenty percent of the owner's property for public highway expansion was required as a condition of a special use permit, or in *Curtis*, *supra*, where the Town's ordinance required conveyance to it of a right of way or easement to a fire pond and access road

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[8] *Waters Landing Ltd. Partnership v. Montgomery County*, 650 A.2d 712 (Md. 1994); *National Ass'n of Home Builders of the United States v. Chesterfield County*, 907 F.Supp. 166 (E.D. Va. 1995); *Southeast Cass Water Resource Dist. v. Burlington Northern Railroad Co.*, 527 N.W.2d 884 (N.D. 1995); *Home Builders Ass'n of Central Arizona v. City of Scottsdale*, 930 P.2d 993 (Ariz. 1997); *Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000); *San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87 (Cal. 2002); *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 135 S.W.3d 620 (Tex. 2004).

[9] *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380 (Iowa Ct. App. 1995) ("*Amoco Oil Company*"); *Art Piculell Group v. Clackamas County*, 922 P.2d 1227 (Or. Ct. App. 1996); *Curtis v. Town of South Thomaston*, 708 A.2d 657 (Me. 1998) ("*Curtis*"); *McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008), *cert. pending* (08-1102).

as a condition of subdivision approval. Indeed, in *Amoco Oil Company*, the court distinguished regulations like Ordinance 2191 from dedications of real property subject to analysis under *Nollan* and *Dolan*: "The exaction of property in this case is the quintessential physical invasion of private property. It is not simply a reduction in, or limitation upon Amoco's use of its property, but it is a permanent loss of the property itself." *Amoco Oil Company*, *supra*, 661 N.E.2d at 389 (footnote omitted).

Amoco Oil Company and *Curtis* reveal that those courts would not have considered Ordinance 2191 as imposing property exactions triggering the application of *Nollan* and *Dolan*. Because the affordable housing requirements of Ordinance 2191 are readily distinguishable from each of the monetary exactions and property dedications reviewed in the other decisions Petitioner relies upon to claim a conflict, it is far from apparent how those courts that found exactions in the facts before them would treat inclusionary housing ordinances, and whether they would have reached different conclusions as to the appropriate doctrinal formula to analyze Petitioner's facial taking claim.

III. CONSTITUTIONAL ADJUDICATION OF INCLUSIONARY HOUSING ORDINANCES WOULD BENEFIT FROM FURTHER DEVELOPMENT IN THE LOWER COURTS

There are few judicial decisions involving inclusionary housing ordinances. Courts have not, therefore, significantly analyzed the threshold question of whether to characterize these ordinances as regulations governing land use, price controls or exactions.

The City is unaware of any lower court opinion that treats an inclusionary housing ordinance as imposing an impermissible *per se* exaction. The Court of Appeal below considered Ordinance 2191 a traditional land use or zoning legislation. This is consistent with the two New Jersey Supreme Court decisions, which also considered such ordinances as traditional land use regulations rather than as exactions. *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390, 448-450 (N.J. 1983); *Holmdel Builders Ass'n v. Township of Holmdel*, 583 A.2d 277, 288 (N.J. 1990). Similarly, in *Home Builders Ass'n of Northern California v. City of Napa*, 108 Cal.Rptr.2d 60, 66 (Ct. App. 2001), *review denied*, (Sept. 12, 2001), *cert. denied*, 535 U.S. 954 (2002), the California Court of Appeal treated the inclusionary housing ordinance before it as generally applicable economic legislation. This approach comports with this Court's treatment of Escondido's rent control ordinance as a regulation of petitioners' *use* of their property in *Yee*. *See, Yee, supra*, 503 U.S. at 532.

Notably, some in Petitioner's shoes have argued that an inclusionary housing ordinance constituted an improper price control regulation. *See, Home Builders Ass'n of Northern California v. City of Napa, supra,* 108 Cal.Rptr.2d at 66-67. If Ordinance 2191 were considered a price or rent control regulation, *Nollan* and *Dolan* would not apply, and analysis under such a claim would determine whether the limitations are confiscatory and fail to permit a fair return.

All of this leads to the conclusion that this Court should await further lower court developments. Until the lower courts have crystallized real differences on the threshold questions of how to characterize inclusionary housing ordinances (e.g., general land use regulations, price control regulations, exactions), and have provided insight into the appropriate legal framework to analyze Fifth Amendment claims against them, this Court should defer review of attempts like Petitioner's to leap frog these threshold questions in seeking review of the discrete question whether legislation is subject to heightened scrutiny review under *Nollan* and *Dolan*.

CONCLUSION

Based on the foregoing, this Court should deny the Petition for Writ of Certiorari.

Dated: April 6, 2009

Respectfully submitted,

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APPENDIX A

City Council Meeting 11-8-05 Santa Monica, California

ORDINANCE NUMBER 2174 (CCS)

(City Council Series)

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SANTA MONICA AMENDING SANTA MONICA MUNICIPAL CODE SECTIONS 9.56.010, 9.56.020, AND 9.56.070 AND ADDING SECTION 9.56.170 TO THE SANTA MONICA MUNICIPAL CODE TO MODIFY THE CALCULATION, ADJUSTMENT, AND PAYMENT TIMING OF THE AFFORDABLE HOUSING FEE, TO ADJUST THE AFFORDABLE HOUSING DEFINITIONS AND TO ESTABLISH A PROVISION TO ADJUST OR WAIVE THE REQUIREMENTS OF CHAPTER 9.56

* * *

SECTION 4. Section 9.56.170 is hereby added to the Santa Monica Municipal Code to read as follows:

Section 9.56.170. Adjustments or waivers.

(a) A multi-family project applicant may request that the requirements of this Chapter be adjusted or waived based on a showing that applying the requirements of this Chapter would effectuate an unconstitutional taking of property.

APPENDIX B

City Council Meeting 4-11-06 Santa Monica, California

ORDINANCE NUMBER 2180 (CCS)

(City Council Series)

AN INTERIM ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SANTA MONICA EXTENDING, WITH MODIFICATIONS AND CLARIFICATIONS, THE INTERIM ORDINANCE MODIFYING THE CITY'S DENSITY BONUS AND AFFORDABLE HOUSING INCENTIVES IN ACCORDANCE WITH STATE DENSITY BONUS LAW

* * *

SECTION 2. Affordable Housing Incentives/Density Bonuses. The following density bonuses and developer incentives/concessions shall be provided when a developer of a housing development seeks and agrees to construct a specified percentage of housing for very low and lower income households, a senior citizen housing development, a qualifying mobilehome park, a common interest for-sale development for moderate income households, or seeks and agrees to donate land or provide child care facilities:

* * *

(c) **Calculation of Minimum Density Bonus in Residential Zones.**

(3) In calculating the minimum density bonus established by this subsection (c) or the additional density bonus established by subsection (d), the density bonus units shall not be included when determining the number of restricted affordable units required to qualify for a density bonus and any calculations resulting in a fractional number shall be rounded upwards to the next whole number. Each housing development is entitled to only one density bonus, which may be selected based on the percentage of either very low restricted affordable units, lower income restricted affordable units or moderate income restricted affordable units, or the development's status as a senior citizen housing development or qualifying mobilehome park. Density bonuses from more than one category may not be combined.

* * *

(d) **Additional Density Bonus Increase in Residential Zones.** As set forth in the Density Bonus Calculation Table and Density Bonus Summary Table immediately following this subsection (d), a housing development shall be granted an increase in the density bonus up to a maximum of thirty-five percent (35%) by increasing the number of restricted affordable units, as follows:

(1) For each one percent (1%) increase in the percentage of restricted Very Low Income affordable units, a housing development will receive an additional two and one-half percent (2.5%) density bonus up to a maximum of thirty-five percent (35%).

(2) For each one percent (1%) increase in the percentage of restricted Lower Income affordable units, a housing development will receive an additional one and one-half percent (1.5%) density bonus up to a maximum of thirty-five percent (35%).

(3) For each one percent (1%) increase in the percentage of Moderate Income affordable units, a for-sale housing development will receive an additional one percent (1%) density bonus up to a maximum of thirty-five percent (35%).

(4) For each one percent (1%) increase above the minimum ten percent (10%) land donation described in Government Code Section 65915(h)(2), the density bonus shall be increased by one percent (1%) to a maximum of thirty-five percent (35%). This increase shall be in addition to any increase in density mandated by subdivision (c) of this Section, up to a maximum combined by-right density increase of thirty-five percent (35%).

(5) No additional density bonus increases shall be authorized for senior citizen housing developments or qualifying mobile-home parks beyond the bonus authorized by subsection (c) of this Section.

Density Bonus Summary Table				
Target Group	*Minimum* % *Restricted Affordable* Units	*Bonus* *Granted*	*Additional* *Bonus for* Each *1% Increase in Restricted Affordable* Units	*% Restricted Affordable Units* *Required for Maximum* 35% Bonus
Very Low Income	5%	20%	2.5%	11%
Lower Income	10%	20%	1.5%	20%
Moderate Income (Common Interest Dev.)	10%	5%	1%	40%
Senior Citizen Housing Development/Qualifying Mobilehome Park	100%	20%	–	–

App. 6

Density Bonus Calculation Table

Percentage of Very-Low Income Units	Density Bonus Percentage
5	20
6	22.5
7	25
8	27.5
9	30
10	32.5
11	35

Percentage of Lower-Income Units	Density Bonus Percentage
10	20
11	21.5
12	23
13	24.5
14	26
15	27.5
16	29.0
17	30.5
18	32
19	33.5
20	35

Percentage of Moderate-Income Units	Density Bonus Percentage
10	5
11	6
12	7
13	8
14	9
15	10
16	11
17	12
18	13
19	14
20	15
21	16
22	17
23	18
24	19
25	20
26	21
27	22
28	23
29	24
30	25
31	26
32	27
33	28

34	29
35	30
36	31
37	32
38	33
39	34
40	35

* * *

(g) **By-Right Parking Incentives.** Density bonus housing developments shall be granted the following maximum parking standards, inclusive of handicapped and guest parking, which shall apply to the entire development, not just the restricted affordable units, when requested by a developer:

(1) Zero to one bedroom dwelling unit: one onsite parking space

(2) Two to three bedrooms dwelling unit: two onsite parking spaces

(3) Four or more bedrooms: two and one-half parking spaces

If the total number of spaces required results in a fractional number, it shall be rounded up to the next whole number. For purposes of this subsection (g), this parking may be provided through tandem parking or uncovered parking, but not through on-street parking.

(h) **Incentives or Concessions.** As set forth in the incentives/concessions summary table immediately following this subsection (h), in addition to by-right parking incentives identified in subsection (g) above, density bonus housing developments shall be granted one, two or three incentives or concessions as follows:

(1) For housing developments with Very Low Income restricted units:

(i) One incentive or concession if five percent (5%) of the units (not including the bonus units) are set aside for very low income households.

(ii) Two incentives or concessions if ten percent (10%) of the units (not including the bonus units) are set aside for very low income households.

(iii) Three incentives or concessions if fifteen percent (15%) of the units (not including the bonus units) are set aside for very low income households.

(2) For housing developments with Lower Income or Moderate Income restricted units:

(i) One incentive or concession if ten percent (10%) of the units are set aside for lower income households or if ten percent (10%) of the units are set aside for moderate income households in a common interest development.

(ii) Two incentives or concessions if twenty percent (20%) of the units are set aside for lower income households or if twenty percent (20%) of the units are set aside for moderate income households in a common interest development.

(iii) Three incentives or concessions if thirty percent (30%) of the units are set aside for lower income households or if thirty percent (30%) of the units are set aside for moderate income households in a common interest development.

(3) Housing developments that meet the requirements of Government Code Section 65915(b) and include a child care facility that will be located on the premises of, as part of, or adjacent to, the development, shall be granted an additional concession or incentive that contributes significantly to the economic feasibility of the construction of the child care facility.

(4) In submitting a proposal for the number of incentives or concessions authorized by this subsection (h), a housing developer may request the specific incentives set forth in the Menu of Incentives/Concessions in subsection (i) or subsection (j) of this Section or may submit a proposal for other incentives or concessions. The process for reviewing this request is set forth in subsection (o) of this Section.

Incentives/Concessions Summary Table

Target Group	*Restricted Affordable Units*		
Very Low Income	5%	10%	15%
Lower Income	10%	20%	30%
Moderate Income (Common Interest Dev.)	10%	20%	30%
Maximum Incentive(s)/ Concession(s)	1	2	3

(i) **Menu of Incentives/Concessions in Residentially Zoned Districts.** Housing developments in residentially zoned districts that meet the requirements of subsection (h) may request one or more of the following incentives, as applicable:

(1) Up to a fifteen percent (15%) deviation from one side yard setback requirement.

(2) Up to a ten percent (10%) deviation from the parcel coverage requirement.

(3) Up to fifteen percent (15%) deviation from front or rear yard setback requirements so long as rear yard setback is at least five feet.

* * *

(n) **Waiver/Modification of Development Standards.** Developers may seek a waiver or modification of development standards that will have the effect of precluding

the construction of a density bonus housing development at the densities or with the concessions or incentives permitted by this Section. The developer shall show that the waiver or modification is necessary to make the housing units economically feasible and that the development standards will have the effect of precluding the construction of a housing development meeting the criteria of subsection (c) of this Section at the densities or with the concessions or incentives permitted by this Ordinance.

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(3)

No. 08-1139

In the

Supreme Court of the United States

ACTION APARTMENT ASSOCIATION,
Petitioner,

v.

CITY OF SANTA MONICA, CITY COUNCIL OF THE CITY OF SANTA MONICA, COUNCIL MEMBERS ROBERT T. HOLBROOK (MAYOR), BOBBY SHRIVER (MAYOR PRO TEMPORE), PAM O'CONNOR, KEVIN McKEOWN, HERB KATZ, RICHARD BLOOM, and KEN GENSER, in their official capacities, and ALL PERSONS INTERESTED IN THE VALIDITY OF ORDINANCE NO. 2191 AMENDING MUNICIPAL CODE SECTIONS 9.56.050 AND 9.56.060,
Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Petitioner Action Apartment Association seeks review of the California Court of Appeal's decision holding that the heightened scrutiny of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), does not apply to legislatively imposed exactions. Respondents City of Santa Monica *et al.* (City) argue against a grant of certiorari, but their contentions actually weigh in favor of this Court's review.

First, the City argues that Ordinance 2191's waiver provision makes the Association's challenge premature; but the City does not recognize that whether a waiver provision like Ordinance 2191's (which places the burden of proof on the waiver applicant) is itself constitutional merits this Court's review. Second, the City misreads *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), for the proposition that *Nollan* and *Dolan* do not apply to certain types of exactions, such as those property interests exacted as part of an inclusionary zoning scheme. The City concludes that the petition does not merit this Court's review, even though many of the lower courts that have split on the legislative-adjudicative distinction have also split on the issue of whether only certain types of exactions are subject to heightened scrutiny. Thus, the City's basis for denying the petition in fact lends further support to the importance of this Court's review of the issue. Finally, the City contends that the lower courts should be given more time to address whether inclusionary zoning ordinances should be subject to *Nollan* and *Dolan*. But allowing the issue to "percolate" further would serve no purpose except to

exacerbate already existing conflicts. The petition should be granted.

ARGUMENT

I

THE CITY'S STATEMENT OF THE CASE RAISES CONCERNS THAT ARE PROPERLY ADDRESSED ON REMAND

The City contends that through density bonus laws and other perquisites, Ordinance 2191's impact on developers is substantially attenuated. Opposition at 2-3. Whether or not the City's characterization of those perquisites is accurate, it is an issue that is properly considered only *after* the prescinding determination has been made of the level of scrutiny to be applied. In other words, whether or not developers are sufficiently compensated so as to have no constitutional claim against Ordinance 2191 properly pertains to whether a rough proportionality exists between the potential harm of new market-rate housing and the rights exacted from developers of such housing under Ordinance 2191. The degree to which any density bonus or other perquisite makes Ordinance 2191's exactions roughly proportional has no bearing on whether the petition merits this Court's review.[1]

The City also objects to the Association's characterization of how Ordinance 2191 is applied. *See* Opposition at 4-7. Again, whether or not the City's assessment of Ordinance 2191's operation is accurate is an issue properly considered only once the level of

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[1] For the same reason, the City's allusion to its supposed "Nexus" study, *see* Opposition at 3 n.2, is irrelevant.

scrutiny has been determined. Nothing in the City's description changes the fact that Ordinance 2191 conditions building permits on giving up valuable property rights. And this fact alone raises the legal question presented in the petition: Should legislatively imposed exactions be subject to less rigorous judicial review?

II

THE CITY'S CONTENTION THAT THE ASSOCIATION'S CONSTITUTIONAL CHALLENGE IS UNRIPE PRESENTS AN ADDITIONAL BASIS FOR THIS COURT'S REVIEW

The City argues that review is unwarranted because the Association's facial claims are unripe. *See* Opposition at 7-8. Specifically, the City contends that Ordinance 2191's waiver provision—which allows a developer to obtain a waiver of the affordable housing mandate if the developer can establish that application of that mandate to it would be unconstitutional, *see* Petitioner's Appendix (Pet. App.) at E.20 (§ 9.56.170(b))—precludes any facial challenge. The City's argument is without merit and, in any event, only supports this Court's review.

In *Dolan*, this Court expressly placed the burden on the government to establish nexus and rough proportionality. 512 U.S. at 391 ("[T]he city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."). In contrast, Ordinance 2191's waiver provision unconstitutionally places the burden of proof on the applicant by requiring that a permit applicant

establish that the application of the Ordinance would be unconstitutional. For this reason, the waiver provision cannot bar a facial challenge: either *Nollan* and *Dolan* apply to Ordinance 2191, and the waiver provision is an unconstitutional attempt to shift the burden of proof to the permit applicant, or *Nollan* and *Dolan* do not apply, and the waiver provision becomes irrelevant.

Hence, not only is the Association's challenge ripe, but the City's arguments to the contrary actually weigh in favor of granting review by highlighting the distinct yet important legal question of whether waiver provisions like Ordinance 2191's can effectively bar facial challenges under *Nollan* and *Dolan*.

III

THE PETITION SQUARELY PRESENTS THE LEGISLATIVE-ADJUDICATIVE DISTINCTION FOR THIS COURT'S REVIEW

A. The City Misreads *Lingle* and Improperly Limits the Scope of *Nollan* and *Dolan*

In opposing the Association's petition, the City contends, relying upon *Lingle*, that the requirements of Ordinance 2191 are not the type of exactions covered by *Nollan* and *Dolan*. *See* Opposition at 8-12. The argument is unfounded, for several reasons.

First, *Lingle* did not limit the scope of *Nollan* and *Dolan* just to only certain types of exactions. The Court explicitly stated that nothing in its decision should be read as changing the law of exactions. *See* 544 U.S. at 547. The Court went further to confirm

that *Nollan* and *Dolan* "involve a special application of the doctrine of unconstitutional conditions." *Id.* (internal quotations omitted). Nowhere does *Lingle* adopt the restrictive interpretation the City advances. Second, scholarly commentary has consistently interpreted *Nollan* and *Dolan* as applying, in the land use context, whenever government conditions its permitting power on an applicant's giving up of some valuable right. *See* Petition at 15 n.4 (citing authorities). Third, the City's narrow conception of a "qualifying" exaction comports neither with modern regulatory practice, in which use of exactions has expanded to fund all sorts of social welfare programs,[2] nor with the academy's understanding.[3]

The City's narrow understanding of the scope of *Nollan* and *Dolan* is therefore without merit.

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[2] Steven J. Eagle, *Regulatory Takings* § 4-4(e) (3d ed. 2005) ("Linkage fees are fees imposed upon development to fund the costs of governmental programs that are 'linked' to that development. . . . Linkage fees have been controversial precisely because they do not constitute subdivision controls. . . . Instead, they are exactions, for social welfare purposes, imposed on the occasion of development.").

[3] Daniel S. Huffenus, Dolan *Meets* Nollan: *Towards a Workable Takings Test for Development Exactions Cases*, 4 N.Y.U. Envtl. L.J. 30, 33 (1995) ("Generally, any requirement that a developer provide or do something as a condition of receiving municipal approval is an exaction.").

B. The Extent to Which the Lower Courts Are Divided over the Type of Exactions Subject to *Nollan* and *Dolan* Provides Further Ground for this Court's Review

The City contends that the petition presents a poor vehicle for review of the legislative-adjudicative distinction because inclusionary zoning ordinances do not exact any interest cognizable under *Nollan* and *Dolan*. *See* Opposition at 12-14. The City's position is faulty, for at least two reasons.

First, the court of appeal's decision below squarely rests upon the assertion that the heightened scrutiny of *Nollan* and *Dolan* "applies only in the case of individual adjudicative permit approval decisions; not to generally applicable legislative . . . zoning decisions." Pet. App. at A-18. On that basis, the court of appeal affirmed the dismissal of the Association's facial challenge to Ordinance 2191. *See id.* at A-21. The legislative-adjudicative distinction is directly raised.

Second, the City's arguments for a restrictive view of *Nollan* and *Dolan* merely reinforce the need for this Court's review. Just as many lower courts have held that legislative exactions should be subject to heightened scrutiny, many courts have also held that *Nollan* and *Dolan* should apply to a broad range of exactions, not just real property interests. *See, e.g.*, *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004) (costs for street improvements); *Homebuilders Ass'n of Dayton & the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 354-56 (Ohio 2000) (same); *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 868-69 (1996) (recreation and public art fees).

Other courts, however, have adopted more limited understandings of *Nollan* and *Dolan* and the types of exactions that are subject to heightened scrutiny. *See, e.g.*, *McClung v. City of Sumner*, 548 F.3d 1219, 1225 (9th Cir. 2008), *pet'n for cert. pending* (declining to apply heightened scrutiny to a development condition that "does not require the owner to relinquish rights in the real property"); *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997), *cert. denied*, 521 U.S. 1120 (1997) (declining to apply heightened scrutiny to a fee exaction in part because "a fee [is] a considerably more benign form of regulation" than an exaction of real property).[4]

Thus, the debate over whether inclusionary zoning ordinances are subject to an exactions analysis under *Nollan* and *Dolan*, rather than undercutting review in the City's opinion, in fact supports this Court's review of the Association's petition, by highlighting another basis upon which lower courts are divided.

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[4] *Cf.* 2A Nichols, *Eminent Domain* § 6.13[3][b], at 6 218 (3d ed. 2002) ("[A]n important distinction [exists] between ordinances requiring installation of streets, sidewalks, sewers and drainage facilities which are inextricably tied to the needs of the subdivision development, and those ordinances which require dedication of land . . . where the nexus between the use requirement and the subdivision development is less than evident.").

IV

RESOLUTION OF THE CONFLICT AMONG THE LOWER COURTS OF THE LEGISLATIVE-ADJUDICATIVE DISTINCTION IS RIPE, AND FURTHER DEVELOPMENT OF THAT CONFLICT IS UNNECESSARY

The City's final argument against review is that lower courts should be given more time to address whether to apply heightened scrutiny to inclusionary zoning ordinances. *See* Opposition at 15-16. The contention is without merit, for two reasons.

First, as demonstrated in the petition, *see* Petition at 8-11, and this reply brief, *see supra* Part III.B, the lower courts are already sharply divided on the import of the legislative-adjudicative distinction, *as well as* on whether heightened scrutiny should be applied to all or just certain types of exactions. Refusing to address these issues now will serve no purpose other than to exacerbate existing conflicts.

Second, contrary to the City's view, *see* Opposition at 16, it is of no moment that there are few reported cases reviewing the constitutionality of inclusionary zoning ordinances. One could easily have said that there were few if any cases addressing dedication of beach easements when this Court chose to review *Nollan*, or that there were few if any cases addressing dedication of green belts and bicycle paths when this Court chose to review *Dolan*. What matters is not whether the precise factual circumstances at issue here have been repeated in other cases and jurisdictions. Rather, what matters is that the *issue* raised by the particular facts here—whether *Nollan* and *Dolan* apply

to legislatively imposed exactions—is one of significant importance to property owners throughout the nation, over which the lower courts have reached sharply different conclusions. Review is merited.

CONCLUSION

For the foregoing reasons, the petition should be granted.

DATED: April, 2009.

Respectfully submitted,

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